Supreme Court, U.S.
FILED
931 DEC 13 1995
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No. ____

In The

Supreme Court of the United States

October Term, 1995

UPS WORLDWIDE FORWARDING, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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113 pp

QUESTIONS PRESENTED FOR REVIEW

I. May the United States Postal Service negotiate unpublished international postal rates and services, which differ from mailer to mailer and are not available to the public at large, with mailers who are "capable" of giving but who do not actually give the Postal Service large volumes of mail, when its governing statute (1) requires the Postal Service to meet its statutory responsibilities by providing "types" of service for different "categories" of mail and mail users and (2) prohibits "any undue or unreasonable discrimination among users of the mail"?

II. Where Congress requires that certain agency action be taken only with the consent of the President and the agency concedes that it did not seek the President's consent, does a failure of the President to object to the action satisfy the statutory consent requirement when there is no evidence that the President was made aware of the proposed action?

LIST OF PARTIES IN THE COURT BELOW

The following were parties in the court below:

1. UPS Worldwide Forwarding, Inc., which is a wholly-owned subsidiary of United Parcel Service of America, Inc. – UPS Worldwide Forwarding, Inc. does not have any nonwholly owned subsidiaries;

2. Air Courier Conference of America/International Committee, an unincorporated trade association; and

3. The United States Postal Service, an independent establishment of the executive branch of the United States Government.

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (A1-43) is reported at 66 F.3d 621 (3d Cir. 1995). The opinion of the United States District Court for the District of Delaware (A44-59) is reported at 853 F. Supp. 800 (D. Del. 1994).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (A1-43) was entered on September 15, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which authorizes review by writ of certiorari of judgments of the United States courts of appeals.

STATUTES AND REGULATION INVOLVED

This case involves the validity of a United States Postal Service regulation under which the Postal Service grants itself the power to negotiate unpublished contractual international postal rates and services that are not made available to the general public. The regulation is contained in subchapter 290 of the Postal Service's *International Mail Manual*, ¶¶ 291-294, A66-68. The *International Mail Manual* ("*IMM*") is incorporated by reference in the Code of Federal Regulations at 39 C.F.R. § 20.1 (1995). The full text of the regulation is set out in the Appendix to this Petition at A66-68.

International postal rates and services are governed by the Postal Reorganization Act of 1970, as amended, 39 U.S.C. § 101 *et seq.* (the "Act"). Section 101(d) of the Act provides that "[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." 39 U.S.C. § 101(d). Particularly at issue here are section 403(a) of the Act, which states that "[t]he Postal Service shall . . . provide adequate and efficient postal services at fair and reasonable rates and fees"; section 403(b)(2), which states that "[i]t shall be the responsibility of the Postal Service – . . . to provide types of mail service to meet the needs of different categories of mail and mail users"; section 403(c), which prohibits "any undue or unreasonable discrimination among users of the mails"; and section 407(a), which provides that "[t]he Postal Service, with the consent of the President, . . . may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries." 39 U.S.C. §§ 403(a), 403(b)(2), 403(c), 407(a).

The full text of these sections of the Act is set out in the Appendix to this Petition at A62-65.

STATEMENT OF THE CASE

On May 24, 1993, the Postal Service adopted a regulation granting itself the authority to do something which it had never done before – negotiate with certain international mailers largely secret contracts that provide for special prices and extra services not available to the general public. 58 Fed. Reg. 29778 (1993). The Postal

Service's historical practice had always been to establish international rates and services for defined categories of mail. The services provided, the prices charged, and the requirements for obtaining those services and prices were all published beforehand and were the same for all persons mailing the same types and volumes of mail to the same destinations. In contrast, the contracts negotiated under the regulation at issue contain prices and services that vary from one mailer to another.[1]

Under the regulation, only mailers who are capable of annually generating one million pounds of international mail or $2 million of international postage may negotiate a contract. A66 (*IMM* ¶ 292). The mailer need not actually tender any specified amount of mail or pay any specified amount of postage in order to negotiate its own rates or special services, but need only be "capable" of doing so. *See* 57 Fed. Reg. 30651, 30653 n.3 (1992) (interim regulation) ("This criterion does not mean that the mailer will be *required* to enter into a service agreement . . . covering one million pounds or two million dollars.") (emphasis added). A majority of the actual negotiated contracts do not require the mailer to tender any minimum volume of mail or to pay any minimum amount of postage. Thus, as the district court found, a contracting mailer could receive more services at lower

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[1] The court of appeals stated that the regulation "implement[ed] a new service." A1, 66 F.3d at 623. However, since the rates and services are negotiated "on a mailer-specific basis," A66 (*IMM* ¶ 291), the regulation does not establish a single service but rather permits the negotiation of as many new services as there are shippers who qualify to negotiate their own rate and service deals with the Postal Service.

prices than are available to other mailers who send the same kinds of mail to the same destinations in the same (or greater) quantities but who are not permitted to negotiate their own contractual rates and services. A51-52, 853 F. Supp. 800, 805 (D. Del. 1994).

The actual contracts are not made public; instead, only selected contract terms are published in the *Postal Bulletin*, a Postal Service publication sold on a subscription basis. A67 (*IMM* ¶ 294).

UPS Worldwide Forwarding, Inc. ("UPS"), a competitor of the Postal Service, brought suit in the United States District Court for the District of Delaware to enjoin the Postal Service from negotiating these contractual rates and services on the ground that the Postal Service regulation authorizing the practice violates the Postal Service's governing statute. The Air Courier Conference of America/International Committee, a trade association of Postal Service competitors, intervened as a plaintiff. The district court had federal jurisdiction pursuant to 28 U.S.C. §§ 1331, 1339 (postal matters) and 39 U.S.C. § 409 (actions against the Postal Service).

UPS contended that the regulation violates sections 101(d), 403(a), 403(b)(2), 403(c), and 407 of the Act, which require the Postal Service to establish, on a nondiscriminatory basis, fair and equitable international rates for "types" of mail service for different "categories" of mail and mail users. UPS argued that these provisions require all postal rates to be generally available on the same basis to the public at large and therefore do not authorize the Postal Service to negotiate prices and services that vary from mailer to mailer. UPS also claimed

that the negotiated rates were illegal because the statute requires the President to consent to international postal rates and the Postal Service had not asked the President to consent to the rates at issue.

The Postal Service moved to dismiss, contending that UPS lacked standing and had failed to state a claim for which relief could be granted. UPS filed a cross-motion for summary judgment. The district court (Latchum, S.J.) held that UPS had standing and found the regulation to be unlawful on three separate grounds.

The Postal Service appealed to the United States Court of Appeals for the Third Circuit. The court of appeals (in an opinion by Scirica, J.) affirmed the district court's decision on the standing issue but reversed on the merits.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

This case involves the proper interpretation of the congressionally imposed requirements for establishing the postal rates paid by the American public to send mail overseas. At issue is the legitimacy of a Postal Service regulation which strikes at the heart of the statutory limitations on the Postal Service's international ratemaking authority. The regulation in question expands the power of a federal instrumentality that competes with private enterprise to determine the legitimacy of its own competitive actions.

The Postal Service has tremendous economic power. Its revenues currently exceed $54 billion annually. Postal

rates affect every business and, directly or indirectly, every individual in the United States. In addition, international postal rates affect trade with other nations and foreign businesses and commerce. Postal rates and service offerings also determine, as a practical matter, who is able to compete with the Postal Service in its non-monopoly classes of mail.[2] In recognition of this pervasive economic impact and in order to forestall possible abuse of the Postal Service's governmental status and monopoly power, Congress established standards for and limits on the Postal Service's ratemaking authority, both domestic and international.

The court of appeals, in a decision that has nationwide impact, has interpreted the Postal Service's governing statute in a way that nullifies these standards and limits.

1. The decision of the court of appeals – finding acceptable the practice of negotiating international postal rates and services in contracts that are never disclosed to the public – reads out of the statute the language which requires the Postal Service to provide "types" of service for "categories" of mail and mail users and to "establish rates" for those services. The decision legitimizes undue discrimination among mailers as well as unfair Postal Service competition with private enterprise, contrary to

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[2] The Postal Service has a legally sanctioned monopoly over letter mail, whether delivered in the United States or sent overseas. 18 U.S.C. §§ 1694-1697. It does not have a legally authorized monopoly, either domestically or internationally, over non-letter mail (*e.g.*, packages). The Postal Service regulation at issue covers both letter mail and non-letter mail.

the statutory requirements that all postal rates (including international rates) be fair, equitable, and non-discriminatory. Were this decision permitted to stand, it would be an extremely dangerous precedent not only for postal rate regulation, but for trade regulation generally. Indeed, in condoning discrimination whenever it "reflects . . . the most effective means to solicit new customers" (A31, 66 F.3d at 634), the court of appeals has legitimized a practice which both Congress and the courts (including this Court) have condemned as the classic example of unreasonable discrimination: providing the same or similar services at different prices to different mailers.

In so doing, the court of appeals misunderstood the special nature of the Postal Service. While Congress " 'launch[ed] the Postal Service into the commercial world,' " A7, 66 F.3d at 625, citing *Loeffler v. Frank*, 486 U.S. 549, 556 (1988), Congress also recognized that the Postal Service remains "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201. In adopting provisions designed to facilitate efficient postal operations, Congress at the same time erected safeguards against abuse of the Postal Service's enormous economic and governmental powers. The decision of the court of appeals sacrifices those safeguards in favor of a view of the statute which exalts the goal of Postal Service efficiency above all else. Its approach has implications far beyond the establishment of international postal rates, which are enormously significant in their own right.

2. This case also raises a second matter, never before addressed by this Court: whether a congressionally imposed requirement that the President consent to

certain agency action is satisfied by the absence of presidential objection in the face of an admitted failure by the agency to seek presidential consent or even to inform the President of the impending action. The statute at issue here requires the Postal Service to obtain presidential consent to the rates charged for mail sent to foreign countries. There are presently other statutes which require presidential consent. *See* 10 U.S.C. § 7427; 22 U.S.C. § 2314(a); 39 U.S.C. § 5002. They involve important foreign affairs or defense matters (as well as important domestic concerns). In each case, the President has taken some affirmative action pursuant to the presidential consent requirement.

If the decision of the court of appeals is permitted to stand, the Postal Service's power to set international postal rates would be virtually unchecked. The question whether a statutory requirement of presidential consent is satisfied by a failure of the President to object when the agency does not seek consent and the President is not even aware of the agency's action is an important issue that should be resolved by this Court.

I. THE QUESTION OF POSTAL SERVICE AUTHORITY TO NEGOTIATE UNPUBLISHED CONTRACTS PROVIDING FOR INTERNATIONAL RATES AND SERVICES BASED ON POTENTIAL RATHER THAN ACTUAL VOLUME TENDERED IS AN IMPORTANT MATTER OF NATIONWIDE IMPACT WHICH AFFECTS ALL BUSINESSES AND CITIZENS WHO SEND MAIL OVERSEAS AS WELL AS THE POSTAL SERVICE'S COMPETITORS AND SHOULD BE SETTLED BY THIS COURT.

A. The Decision of the Court of Appeals Ignores the Plain Language of the Statute.

In reaching its conclusion that the Postal Service may negotiate secret rate and service contracts, the court of appeals ignored the oft-repeated instruction of this Court that the "one, cardinal canon" of statutory construction is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). The court of appeals has effectively nullified the language in the Act which requires that the Postal Service meet its statutory responsibilities by providing "types" of mail service which satisfy the needs of different "categories" of mail and mail users, and then "establish rates" for those services.

1. Section 403(b)(2) of the Act explicitly states that "[i]t shall be the responsibility of the Postal Service . . . to provide *types* of mail service to meet the needs of different *categories* of mail and mail users." 39 U.S.C. § 403(b)(2) (emphasis added). This provision ensures that all postal services are generally available to all mailers on an equal basis. As the House Report on the Act stated,

section 403 "explicitly carrie[s] forward" the "existing concept of universality of postal service." H.R. Rep. No. 1104 at 9, *reprinted in* 1970 U.S.C.C.A.N. 3649, 3657. Individually negotiated rates and services that vary from one mailer to the next are the antithesis of this statutory scheme.

The court of appeals held that this provision merely sets forth "the minimum required" of the Postal Service and that therefore, "as long as the Postal Service provides service to 'meet the needs of different categories of mail and mail users,' it also may provide individualized service." A36, 66 F.3d at 636. But this fails to take into account the fact that the Postal Service is a federal instrumentality which has only those powers specifically conferred on it by its enabling statute and may exercise those designated powers only in the manner specified by Congress. The Postal Service does not have a roving mandate to do whatever it wants in the manner it finds most convenient as long as it also does what Congress authorizes it to do.

2. The language of section 407(a) reinforces the conclusion that international postal rates may not be the subject of negotiation with individual mailers. The Postal Service's authority under that section is to "establish" international "rates or other charges," not to negotiate prices. The term "establish" suggests something more lasting and fixed than the negotiation of prices and services "on a mailer-specific basis." A66 (*IMM* ¶ 291). In fact, the court of appeals recognized in a prior decision interpreting the same statute that the term "establish" means "to set up . . . permanently." *Air Courier Conference v. United States Postal Service*, 959 F.2d 1213, 1220-21 (3d

Cir. 1992), quoting Webster's New Dictionary and Thesaurus 197 (Concise ed. 1990). Nevertheless, the court here held that "establish" cannot possibly mean "creating permanent rates."[3] A37, 66 F.3d at 636.

The negotiation of "mailer-specific" rates, sanctioned by the court of appeals, is diametrically opposed to the entire statutory scheme, which presupposes standard mail services and rates established for types of service and categories of mail and mail users made available on the same terms to all mailers.

B. The Decision of the Court of Appeals Is Contrary to Established Law Concerning What Constitutes Undue Discrimination.

In establishing mail classifications and rates, the Postal Service is explicitly commanded not to "make any undue or unreasonable discrimination among users of the mails" or to "grant any undue or unreasonable preferences to any such user." 39 U.S.C. § 403(c). The court of appeals found "it difficult to define the contours of what constitutes 'undue or unreasonable' discrimination or preference." A32, 66 F.3d at 634. As a result, it held that

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[3] The court also mistakenly sought to justify individually negotiated international rates and services by comparing them to domestic Express Mail Custom Designed service. This domestic service involves a single set of published rates available to the public at large, *not* negotiated prices. *See* 39 C.F.R. § 3001.68, App. A, § 500.021. All users of the service pay exactly the same rates. 39 C.F.R. § 500.080, Rate Schedule 501.

"undue" discrimination does not result even though, as the district court found, some shippers may negotiate rates lower than those paid by other shippers who actually send greater volumes of mail to the same destination, and even though the Postal Service, in justifying lower negotiated rates, relied on "economies of scale generated by large-volume customers." A28, 66 F.3d at 633. In so doing, the court ignored the universally accepted definition of what constitutes "undue" rate discrimination.

The terms of actual contracts negotiated pursuant to the regulation show that discriminatory treatment is exactly what has happened under the regulation. Of the contracts entered into prior to the district court's injunction, many provided rates well below the Postal Service's published rates and yet did not require the mailer to actually tender the amount of mail or pay the amount of postage specified in the regulation – or indeed any specific amount at all. *See, e.g.*, A69-76, *Postal Bulletin*, Nos. 21846 (July 22, 1993), 21826 (Oct. 15, 1992) (giving notice of contracts under which the "mailer is not required to meet *any* overall minimum or maximum volume commitments") (emphasis added).

Charging different rates for the same or similar services has long been regarded as the classic example of "undue" discrimination. Congress in the Interstate Commerce Act explicitly so defined this practice as "unreasonable" discrimination:

> A common carrier providing transportation . . . may not charge or receive from a person a different compensation . . . for a service rendered . . . than it charges or receives from

> another person for performing a like and contemporaneous service. . . . A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

49 U.S.C. § 10741(a). This Court has long recognized that "unreasonable" discrimination results when a common carrier charges two different rates for the same service. *See, e.g., Interstate Commerce Comm'n v. Baltimore & Ohio R.R. Co.*, 145 U.S. 263 (1892). The Court there stated that such a practice "operate[s] as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors." *Id.* at 280; *see also American Trucking Ass'ns, Inc. v. FCC*, 377 F.2d 121, 130 (D.C. Cir. 1966) (where a statute prohibits unjust discrimination or undue preferences, "[t]he prohibition against different charges to different customers for like services under like circumstances is flat and unqualified"), *cert. denied*, 386 U.S. 943 (1967).

As the United States Court of Appeals for the District of Columbia Circuit said in *American Trucking Associations*:

> The pertinent section of the statute bristles with "any." It is made unlawful for "any" carrier to make "any" unjust discrimination by "any" means, or to make "any" undue preference to "any" particular person, or to subject "any" person to "any" undue prejudice. . . . Equal prices for like services is in itself a matter of public interest.

377 F.2d at 130 (discussing prior version of the Interstate Commerce Act). Here too, section 403(c) "bristles with

'any' " and prohibits "any undue or unreasonable discrimination" and "any undue or unreasonable preferences" to "any" user of the mails. 39 U.S.C. § 403(c). The Third Circuit here and the District of Columbia Circuit cannot both be right.

The Postal Service's regulation also legitimizes another classic form of "undue" discrimination – "offering special services only to a select group of patrons." *See, e.g., Trailways of New England, Inc. v. Civil Aeronautics Bd.*, 412 F.2d 926, 933 n.15 (1st Cir. 1969); *Transcontinental Bus Sys., Inc. v. Civil Aeronautics Bd.*, 383 F.2d 466, 481-82 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). Under the regulation, the Postal Service not only negotiates special rates but also negotiates special services that are not available to the public at large with mailers who nevertheless are not required to meet any minimum volume commitment.

The court of appeals relied on the ad hoc rationalization of Postal Service counsel that the regulation reflects a permissible "business decision" by the Postal Service not to require a volume or revenue commitment because that " 'would just sort of drive [potential customers] off . . . [and] [i]t is better to make them the offer [and] get them to try the business.' " A30, 66 F.3d at 634. This reasoning undercuts the primary justification used by the Postal Service in support of the regulation: that discounted rates may be offered in exchange for cost savings realized from handling large volumes of mail. Lower negotiated rates cannot be justified on the ground that

the Postal Service saves costs when it handles large volumes of mail where the regulation and the actual contracts do not require the contracting mailer to tender large volumes in order to obtain the lower rates.

The "business decision" relied on by the court of appeals was squarely rejected by this Court long ago in *United States v. Illinois Central R.R.*, 263 U.S. 515, 524-26 (1924). The Court there upheld a claim of unjust discrimination in the face of a railroad's argument that the rate difference at issue was justified because it "was granted solely for the purpose of increasing [the railroad's] own business." *Id.* at 523. The Court stated that "preferences may inflict undue prejudice though the carrier's motives in granting them are honest," and that "[s]elf-interest may not override the requirement of equality in rates." *Id.* at 524; *see also Baltimore & Ohio R.R.*, 145 U.S. at 276 (discriminatory rates are "usually dictated by or tolerated for the promotion of the interests of . . . the corporation itself, or for the benefit of some favored persons at the expense of others").

The evil inherent in the regulation at issue here is compounded by the fact that the contracts negotiated pursuant to the regulation are not made public. While the regulation requires certain information to be published in the *Postal Bulletin* (A67, *IMM* ¶ 294), unlike a publicly filed tariff not all terms and conditions of the service are disclosed. For example, under the regulation, information such as the size and weight limits of the mail, and where the mail is tendered to the Postal Service – factors which affect costs and therefore are necessary to determine if the rate is discriminatory – need not be published. *See*

A67 (*IMM* ¶ 294). In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990), this Court recognized that a statutory requirement of fair rates can be subverted by non-public agreements providing for negotiated rates and services:

> If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published [and] known to all. . . . Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit. . . .

See also Interstate Commerce Comm'n v. Transcon Lines, 115 S. Ct. 689, 695 (1995) (discussing conclusion in *Maislin* that secret negotiation of rates would allow carriers to discriminate in favor of certain customers); *Security Servs., Inc. v. KMart Corp.*, 114 S. Ct. 1702, 1707 (1994) (recognizing that allowing secretly negotiated rates "violated the core purposes of the [Interstate Commerce] Act"); *Regular Common Carrier Conf. v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986) (recognizing that "it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory" if freight forwarders were permitted to provide services at unpublished rates).

The court of appeals' decision undercuts the congressional prohibition of undue discrimination in international postal rates as well as the requirement that such rates be fair and equitable. Its decision conflicts with traditional notions of what constitutes unreasonable discrimination in ratemaking. This Court should grant certiorari in order to harmonize the meaning of undue

discrimination under the Postal Reorganization Act with the well-accepted view of what constitutes undue discrimination under other statutory schemes.

C. The Court of Appeals' Decision Misconstrues the Fundamental Nature of the Postal Service.

The overriding theme of the Postal Reorganization Act is that the Postal Service is like a public utility and therefore should operate as a common carrier in providing postal services. As the President's Commission on Postal Organization stated in its report which led to the adoption of the Act:

> [T]he Post Office is essentially a public utility. It operates as a limited monopoly; it must charge a uniform price for a given class of service and must serve all customers who are willing to pay that price.

Towards Postal Excellence: The Report of the President's Commission on Postal Organization, 128 (June 1968).[4] The negotiation of secret contracts that provide prices and services which differ from one mailer to the next is contrary to the public service nature of the Postal Service. Indeed, the court of appeals itself acknowledged that its holding

> seems antithetical to traditional notions of Postal Service. We expect to pay the same price for a postage stamp as everyone else, not to have to bargain for the best rate.

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[4] The Court has recognized that this report is part of the legislative history of the Act. *See National Ass'n of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 823-24 (1983).

A40, 66 F.3d at 637. Nevertheless, although it stated that "the Postal Service is properly compared to a public utility that charges the same rate to all customers" with respect to domestic rates, it held that this is not so in the case of international rates. *Id.*

The requirement that rates be fair, equitable, and non-discriminatory is the hallmark of public utility rate-making. The Postal Service has always conceded – and the court of appeals has agreed – that sections 101(d), 403(a), and 403(c), which require fair, equitable, and non-discriminatory postal rates, apply to international rates as well as to domestic rates. A28-29, 66 F.3d at 633, citing 57 Fed. Reg. 30651, 30652 (1992). The fact that Congress made these requirements applicable to all postal rates, both domestic and international, makes clear that, in the international arena as well as in the domestic arena, the Postal Service is "properly compared to a public utility that charges the same rate to all customers." A40, 66 F.3d at 637.

The court of appeals' rejection of the public utility/common carrier concept for international rates is based on its conclusion that "the reasons that may compel a uniform rate for postage in the United States *no longer* apply to large-volume international mailers." A40, 66 F.3d at 637-38 (emphasis added). That conclusion reflects a policy decision by the court which rests on two erroneous premises.

1. The court of appeals apparently believed that Congress changed the way international rates were to be set when it adopted the Postal Reorganization Act in 1970. *See* A24-26, 66 F.3d at 632. While Congress did

change many aspects of the Postal Service (including the way domestic postal rates were set) when it adopted the Act, there was no change in the process by which international rates were established. That process has remained essentially unchanged since 1851, when Congress authorized the Postmaster General, "by and with the advice and consent of the President of the United States, . . . to reduce or enlarge, from time to time, the rates of postage upon all letters and other mailable matter conveyed between the United States and any foreign country." Act of March 3, 1851, ch. 20, § 2, 9 Stat. 587, 589.

There is no indication in the Act of any intent to give the Postal Service increased flexibility to do that which it had never before done during its entire existence of two centuries – negotiate mailer-specific international rates that are not generally available to the public at large. On the contrary, while Congress retained the same procedure requiring presidential consent to international rates, it also made clear, for the very first time, that even international postal rates must be fair, equitable, and non-discriminatory. Thus, the situation is exactly the reverse of that stated by the court of appeals: Congress actually *reduced* the Postal Service's flexibility in establishing international rates.

2. The court of appeals was also mistaken concerning the scope of the Postal Service's statutory monopoly – an error which inspired its conclusion that "the reasons that may compel a uniform rate for postage in the United States no longer apply to large-volume international mailers." A40, 66 F.3d at 637-38. In particular, the court of appeals incorrectly believed that the Postal Service's statutory monopoly extends to *all* international mail, including parcels as well as letters. *See, e.g.*, A8, 66 F.3d at 625;

A9 n.5, 66 F.3d at 626 n.5 (citing 39 C.F.R. §§ 320.6, 320.8 for the erroneous proposition that the Postal Service has given private carriers the right to "compete in the international *parcel* delivery market") (emphasis added). However, the Postal Service's monopoly has never covered packages. Based on its mistaken view of the Postal Service's historical statutory monopoly and apparently believing – incorrectly – that the Act changed the scope of that monopoly, the court wrongly concluded that the reasons for requiring international rates and services to be equally available to all on a non-discriminatory basis no longer apply.

Aside from its misapprehension of the scope of the Postal Service's monopoly, the court of appeals erred in suggesting that a unilateral decision by the Postal Service in 1986 to "suspend" its monopoly over international letter mail, A8, 66 F.3d at 625, could somehow change the requirements Congress imposed on international rates in sections 403 and 407 of the Act. The Postal Service cannot change the meaning or applicability of the congressional requirements that the Postal Service establish fair, equitable, and non-discriminatory international postal rates by adopting a regulation which permits others to compete with it for services otherwise subject to its statutory monopoly. That is a matter for Congress, not the Postal Service or the court of appeals. As this Court has said, "[g]eneralized congressional exhortations to 'increase competition' cannot provide [a federal regulatory body] authority to alter the well-established statutory . . . requirements." *Maislin*, 497 U.S. at 135.

The court of appeals relied on this Court's statement in *Loeffler v. Frank*, 486 U.S. 549, 556 (1988), that Congress

" 'launch[ed] the Postal Service into the commercial world.' " A7, 66 F.3d at 625. But the court of appeals misapprehended this Court's decision. Despite the sweeping changes made by the Act to enable the Postal Service to operate on a more business like basis, Congress did not negate the basic public service nature of the Postal Service. As the House Report confirms, Congress' goal was to create a Postal Service capable of conducting its affairs "on a business like basis, *while retaining the public service character* of the Nation's mail system." H.R. Rep. No. 1104 at 6, 1970 U.S.C.C.A.N. at 3654 (emphasis added).

Thus, the legislative history buttresses the plain meaning of the statutory language, which makes clear that Congress intended the Postal Service to remain " – first, last and always – a public service." *Id.* at 19, 1970 U.S.C.C.A.N. at 3668. That is reflected throughout the statute. *See, e.g.*, 39 U.S.C. § 101(a) (providing that the Postal Service "shall be operated as a basic and fundamental service provided to the people by the Government of the United States"). For example, the statute provides that "[n]o small post office shall be closed solely for operating at a deficit." 39 U.S.C. § 101(b). Thus, while Congress removed many of the political and bureaucratic shackles which previously kept the Postal Service from operating more efficiently, it also sought to make sure that fairness would not be sacrificed on the altar of economic efficiency when Postal Service action is to have a direct impact on the American public. The congressional concern was to achieve internal operating efficiency without destroying – as the decision of the court of appeals has done – the public service nature of the Postal Service.

As the United States Court of Appeals for the District of Columbia Circuit has noted in the context of domestic ratemaking, because the dominant objective of Congress was "the prevention of discrimination among the mail classes," the Act must be viewed in "a context in which a concern for equal or fair treatment yields results different from those obtainable if economic efficiency in the allocation of resources were the exclusive or even the dominant goal." *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392, 403-04 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). The decision of the court of appeals in this case departs from that view. Accordingly, its decision should be reviewed and corrected by this Court.

II. CERTIORARI SHOULD BE GRANTED ON THE QUESTION WHETHER A CONGRESSIONAL REQUIREMENT OF PRESIDENTIAL CONSENT TO AGENCY ACTION IS SATISFIED WHEN THE PRESIDENT FAILS TO OBJECT TO AGENCY ACTION OF WHICH HE IS UNAWARE.

Section 407(a) of the Act provides, in relevant part:

> The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries.

The plain language of this provision requires presidential review of international rates so that the Postal Service's international ratemaking authority does not go

unchecked. The decision of the court of appeals effectively removes this check and gives the Postal Service essentially unreviewed authority over international postal rates.

The Postal Service acknowledged before the district court that it did not seek presidential consent to the international rates at issue here. A53, 853 F. Supp. at 805. Indeed, a Postal Service official submitted a sworn affidavit stating that the Postal Service had not sought presidential consent. There is no evidence that the President was even aware of the Postal Service's proposed actions. Thus, in the district court the Postal Service argued that section 407(a) *does not require* presidential consent to international postal rates. The district court correctly rejected that argument. A53-55, 853 F. Supp. at 805-06. On appeal, the Postal Service argued for the first time that the President *had* consented to the negotiated rates at issue because he had not objected to those rates. Clearly, however, a failure to object to what is not even known cannot possibly constitute consent.

There are other statutes which require presidential consent. In none of those instances is there any indication that either the President or the entity involved has relied on uninformed presidential inaction as constituting consent.

For example, Congress has authorized the Secretary of the Navy or, in some circumstances, the Secretary of Energy, "with the consent of the President, [to] make agreements, with respect to lands inside the naval petroleum reserves." 10 U.S.C. § 7427; *see also* Pub. L. No. 95-91, 91 Stat. 565 (Aug. 4, 1977). Apparently recognizing

that the presidential consent provision requires more than merely a failure to object to a proposed agreement, the President has issued executive orders delegating his authority (and duty) to consent to the Secretary of Energy. *See, e.g.*, Executive Order No. 12929, 59 Fed. Reg. 50473 (1994); Executive Order No. 12784, 56 Fed. Reg. 66339 (1991); Executive Order No. 12659, 53 Fed. Reg. 50911 (1988).

Congress has also required presidential consent to certain uses of defense articles or services furnished to foreign countries by the United States. *See* 22 U.S.C. § 2314(a). For example, the agreement supplying defense articles to a foreign country must require the consent of the President to any sale by the foreign country of such articles. *Id.* § 2314(a)(1)(B). The President has recognized that this congressionally imposed requirement of presidential consent is not met by lack of objection. The President has delegated his duty to consent under this statute to the Secretary of State. *See* Executive Order No. 12613, 44 Fed. Reg. 56675, 56677 (1979).

Even more on point, the consistent action of the Postal Service and the President under section 407 itself contradicts the claim that a failure to object is sufficient to satisfy the statutory mandate of presidential consent. The Postal Service's claim, accepted by the court of appeals, that "the undisputed historical record indicates the President and postal authorities have long interpreted § 407(a) as not requiring the affirmative consent of the President," A38, 66 F.3d at 637, is plainly wrong. Section 407 requires the President to consent to international postal conventions as well as to international rates. The President has always manifested his consent to postal conventions by

actively ratifying them. *See, e.g., Message of the President of the United States*, H.R. Ex. Doc. No. 1, 37th Cong., 3d Sess. 159, 162 (1862); *Parcel Post Convention Between Irish Free State and United States*, 44 Stat. 2412 (1926); *Universal Postal Union Convention* (Tokyo 1969), TIAS 5881, 16 U.S.T. 1291; *Universal Postal Union Convention* (Rio de Janeiro 1979), TIAS 9972, 32 U.S.T. 4587. In fact, the President has explicitly stated, in a memorandum issued after UPS submitted its brief on appeal, that the Postal Service has "the obligation . . . to seek the consent of the President to negotiate and conclude postal treaties or conventions."[5] 59 Fed. Reg. 65471 (1994). It is inconceivable that Congress could have intended the same phrase in the same statutory sentence to have two different meanings, depending on whether international postal conventions or international postal rates are involved.

The court of appeals was mistaken in stating that "more than a century's worth of international postal rates" are at issue here. A39 n.15, 66 F.3d at 637 n.15. UPS has challenged only those rates negotiated by the Postal Service pursuant to the Postal Service regulation at issue. Moreover, the Postal Service conceded at oral argument before the district court that a decision requiring presidential consent to international rates would affect only about 3% of all such rates (most of which are not at issue here), since the remaining 97% are established pursuant to postal conventions which are affirmatively approved by the President. *See* A78.

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[5] Of course, absent a constitutional infirmity, not even the President can change or ignore a statutory requirement imposed on him by Congress.

The court of appeals' decision, if not reversed, would be an extremely dangerous precedent. It would permit a federal agency to intentionally ignore a congressionally imposed requirement that the agency seek and obtain the consent of the President to specifically designated action. This Court should resolve the significant question of first impression decided by the court of appeals here.

CONCLUSION

WHEREFORE, Petitioner UPS Worldwide Forwarding, Inc. respectfully requests that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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Dated: December 12, 1995

UPS WORLDWIDE FORWARDING, INC.

v.

UNITED STATES POSTAL SERVICE, Appellant.

Air Courier Conference of America/ International Committee (Intervenor in District Court).

No. 94-7423.

United States Court of Appeals, Third Circuit.

Argued March 10, 1995.

Decided Sept. 15, 1995.

Before: BECKER, SCIRICA, and WOOD, Jr.*, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

In this case, UPS Worldwide Forwarding seeks to prevent the United States Postal Service from implementing a new service for customers that ship significant quantities of international mail. In response, the Postal Service attacks UPS's standing to bring suit. The district court determined that UPS had standing but that the Postal Service exceeded its authority in promulgating the new program. We will reverse.

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* The Honorable Harlington Wood, Jr., United States Circuit Judge for the Seventh Judicial Circuit, sitting by designation.

I.

In July 1992, the Postal Service announced the creation, on an interim basis, of an International Customized Mail ("ICM") service. *See* 57 Fed.Reg. 30651 (1992). Despite protests from UPS, a large delivery company that competes with the Postal Service, the Postal Service adopted the ICM program on a permanent basis in May 1993. *See* 58 Fed.Reg. 29778 (1993).

Under the ICM service, qualifying international mailers negotiate individualized service agreements with the Postal Service to establish the kind of services to be provided and the rate of postage. To qualify for the service, international mailers must be capable, on an annual basis, of mailing at least one million pounds of international mail or paying at least two million dollars in international postage. *Id.*

Two months after publication of the permanent regulation, UPS filed suit in the District of Delaware, alleging the ICM service violated several provisions of the Postal Reorganization Act ("PRA"), Pub.L. No. 91-375, 84 Stat. 719 (1970) (codified at 39 U.S.C. §§ 101-5605). The Postal Service disagreed, claiming that its promulgation of the ICM regulation did not exceed its statutory authority. The Postal Service also contended that UPS lacked standing to file the action. Air Courier Conference of America/International Committee ("ACCA"), an unincorporated association of firms engaged in letter and parcel delivery services, then filed a motion to intervene.

Subsequently, the district court granted UPS's motion for summary judgment. *UPS Worldwide Forwarding, Inc. v. United States Postal Serv.*, 853 F.Supp. 800 (D.Del.1994).

First, the court held that UPS had standing to challenge the Postal Service program. *Id.* at 804. Second, the court found the ICM service violated several sections of the PRA, codified at 39 U.S.C. §§ 101(d),[1] 403(b)-(c),[2] and 407(a)[3] (1988), and issued an injunction barring the Postal Service from operating the program. *Id.* at 804-07. Finally,

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[1] Section 101 provides statements of "Postal policy":

. . . .

(d)Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

[2] Section 403 provides the "[g]eneral duties" of the Postal Service:

(b) It shall be the responsibility of the Postal Service –

. . . .

(2) to provide types of mail service to meet the needs of different categories of mail and mail users. . . .

. . . .

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

[3] Section 407 governs "[i]nternational postal arrangements":

(a) The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries. The decisions of the Postal Service construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be conclusive upon all officers of the Government of the United States.

the court granted ACCA's motion to intervene. *Id.* at 806-07. The Postal Service appealed.

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1339 (1988) and 39 U.S.C. § 409(a) (1988). We have jurisdiction under 28 U.S.C. § 1291 (1988). Our review of these issues of standing and statutory construction is plenary. *See Polychrome Int'l Corp. v. Krigger,* 5 F.3d 1522, 1530 n. 19 (3d Cir.1993) ("We have plenary review of the district court's judgment on standing."); *Resolution Trust Corp. v. Cityfed Fin. Corp.,* 57 F.3d 1231, 1237 (3d Cir.1995) ("Our review of the construction of federal statutes is plenary.").

II.

Before addressing standing and the merits, we consider the history of the statutory sections and regulations at the core of this dispute. This review takes us back more than two hundred years.

In 1789, the First Congress established a Post Office and provided for the appointment of a Postmaster General. *See* Act of Sept. 22, 1789, ch. 16, 1 Stat. 70; *National Ass'n of Greeting Card Publishers v. United States Postal Serv.,* 462 U.S. 810, 813, 103 S.Ct. 2717, 2721, 77 L.Ed.2d 195 (1983). Three years later, Congress approved a statute that "established basic mail rates, granted the Post Office Department a monopoly on mail delivery and authorized the creation of post roads." *See* Joseph W. Belluck, *Increasing Citizen Participation in U.S. Postal Service Policy Making,* 42 Buff.L.Rev. 253, 257 (1994); *see also* Act of Feb. 20, 1792, ch. 7, 1 Stat. 232. Under this Act, Congress set the

rates not only for domestic mail, but also for letters and parcels sent abroad. *Id.* § 26, 1 Stat. at 239.

In 1825 and 1827, Congress passed laws prohibiting the private carriage of letters via stage, boat, horseback, or on foot, thereby "target[ing] transportation of mail which even then was contracted out to private carriers." *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 526, 111 S.Ct. 913, 919, 112 L.Ed.2d 1125 (1991). In the 1825 statute, Congress once again set the rate for domestic and international mail. *See* Act of Mar. 3, 1825, ch. 64, §§ 13, 34, 4 Stat. 102, 105, 112.

Despite the prohibitions on private carriers of mail, "high postal rates enabled private expresses to make substantial inroads into the domestic market for delivery of letters and the 1825 and 1827 Acts proved unsuccessful in prosecuting them." *Air Courier Conference*, 498 U.S. at 526, 111 S.Ct. at 919. In response, Congress passed a series of laws between 1845 and 1851 reducing postage rates. Belluck, *supra*, at 258. Congress believed the 1845 Act, which strengthened the postal monopoly and reduced rates, "would have the dual virtues of driving private expresses out of business and increasing mail volume of the Post Office." *Air Courier Conference*, 498 U.S. at 527, 111 S.Ct. at 919 (citing Act of Mar. 3, 1845, 5 Stat. 732). The 1851 Act continued the trend of reducing rates, but for the first time permitted those international rates set by Congress to be changed via "postal treaty or convention already concluded or hereafter to be made." *See* Act. of Mar. 3, 1851, ch. 20, § 1, 9 Stat. 587, 588. The Act also provided:

> [T]he Postmaster General, by and with the advice and consent of the President of the United States, shall be, and he hereby is, authorized to reduce or enlarge, from time to time, the rates of postage upon all letters and other mailable matter conveyed between the United States and any foreign country, for the purpose of making better postal arrangements with other governments, or counteracting any adverse measures affecting our postal intercourse with foreign countries. . . .

Id. § 2, 9 Stat. at 589. In 1872, Congress combined into one statutory section the authority of the Postmaster General to negotiate postal treaties and change international rates. *See* Act of June 8, 1872, ch. 335, § 167, 17 Stat. 283, 304 ("[T]he Postmaster General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries.").

Although technology advanced rapidly over the next century, the organization of postal services remained largely unchanged. Congress continued to set domestic mail rates, *see* 39 U.S.C. chs. 51-69 (1964), and the Postmaster General retained the authority to change international rates, with the advice and consent of the President. *Id.* § 505. Congress also maintained the Post Office monopoly over mail delivery in an effort to keep revenues high and mailing costs low. *Air Courier Conference*, 498 U.S. at 527-28, 111 S.Ct. at 919-20.

By 1970, however, the Post Office "faced a major financial crisis" that resulted in significant backlogs of mail and postal worker strikes. Belluck, *supra*, at 262, 265.

Congress responded by passing the Postal Reorganization Act, an overhaul of the entire postal system that represented "a dramatic break with the past." *See Mail Order Ass'n of America v. United States Postal Serv.*, 986 F.2d 509, 512 (D.C.Cir.1993); *see also* H.R. No. 1104, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3651-52.

The PRA "abolished the Post Office Department, which since 1789 had administered the Nation's mails," and replaced it with the United States Postal Service, an independent agency within the executive branch. *National Ass'n of Greeting Card Publishers*, 462 U.S. at 813, 103 S.Ct. at 2721. The Act divested Congress of control over postal rates, *id.*, with domestic rates set through a complex process involving the Postal Service, Postal Rate Commission, and Governors of the Postal Service, and international rates set by "[t]he Postal Service, with the consent of the President." *Air Courier Conference of America v. United States Postal Serv.*, 959 F.2d 1213, 1216-23 (3d Cir.1992) (quoting 39 U.S.C. § 407(a)). Congress also ordered the Postal Service to become self-sustaining, generating enough revenue to cover its expenses, thereby "launching 'the Postal Service into the commercial world.' " *Loeffler v. Frank*, 486 U.S. 549, 556, 108 S.Ct. 1965, 1970, 100 L.Ed.2d 549 (1988) (quoting *Franchise Tax Bd. of California v. United States Postal Serv.*, 467 U.S. 512, 520, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984)); *see also H.R. No. 1104, 91st Cong., 2d Sess., reprinted in* 1970 U.S.C.C.A.N. at 3665. At the same time, the Act generally required fairness and forbade undue discrimination or preferences in the establishment of postal rates and services. *See* 39 U.S.C. §§ 101(d), 403(c).

The PRA continued the Postal Service's statutory monopoly "over the carriage of letters in and from the United States," *see Air Courier Conference*, 498 U.S. at 519, 111 S.Ct. at 915. (citing 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606), but it permitted the Postal Service to suspend its monopoly "where the public interest requires." *Id.* (citing 39 U.S.C. § 601(b)). In 1979, the Postal Service suspended its monopoly over "extremely urgent letters" sent within the United States and abroad, thus allowing private couriers such as UPS to compete with it in the overnight delivery of letters. *See id.* (citing 39 C.F.R. § 320.6). In 1986, it went further by generally suspending its monopoly over mail sent abroad. *See id.* at 519-20, 111 S.Ct. at 915-16; *see also* 39 C.F.R. § 320.8.[4]

III.

Article III of the Constitution restricts the "judicial power" of the United States to the resolution of "cases" and "controversies." *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752, 757-58, 70 L.Ed.2d 700 (1982). Subsumed within this restriction is the requirement that "a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Id.* U.S.C.A. Const. Art. 3, § 1 et seq. Standing has constitutional and prudential components, both of which must be satisfied before a

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[4] Section 320.8 suspends the postal monopoly for "international remailing," which involves "bypassing the Postal Service and using private courier systems to deposit with foreign postal systems letters destined for foreign addresses." *Air Courier Conference*, 498 U.S. at 520, 111 S.Ct. at 915-16.

litigant may seek redress in the federal courts. *Id.*; *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir.1994).

A.

Earlier this year, the Supreme Court reiterated the three elements necessary to satisfy "the irreducible constitutional minimum of standing":

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, ___ U.S. ___, ___, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)).

In this case, there is no dispute that UPS meets the constitutional standing requirements. First, as a competitor of the Postal Service with authority to compete in the international parcel delivery market,[5] UPS stands to lose clientele lured to the Postal Service by the ICM service. Although UPS may not have demonstrated any lost business yet, the "injury in fact" component of standing merely requires that such injury be "imminent." *Id.*; *see also Schering Corp. v. FDA*, 51 F.3d 390, 395 (3d Cir.1995)

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[5] *See* 39 C.F.R. §§ 320.6, 320.8 (1994); *see also supra* part II.

(noting that "threatened injury" suffices for Article III standing). Second, the requisite "causal connection" between UPS's injuries and the Postal Service's conduct is clear; in fact, the Postal Service created the ICM program with the express purpose of "attract[ing] customers that currently use its competitors and [that] would not otherwise use the Postal Service for their international mailings. If the Postal Service is successful, the additional volume will come from competitors, not from the Postal Service's other international services." 58 Fed.Reg. 29778, 29780. Finally, a decision favorable to UPS will undoubtedly redress its injuries. If we uphold the district court's decision for UPS, the Postal Service will not be able to implement the ICM service, and UPS cannot lose customers to a program that does not exist.

B.

In addition to the Article III standing requirements, federal courts have developed prudential standing considerations "that are part of judicial self-government." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). These prudential standing rules require that:

> (1) a litigant "assert his [or her] own legal interests rather than those of third parties," (2) courts "refrain from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' " and (3) a litigant demonstrate that her interests are arguably within "the zone of interests" intended to be protected by the statute, rule or constitutional provision on which the claim is based.

Wheeler v. Travelers Ins. Co., 22 F.3d 534, 538 (3d Cir.1994) (citations omitted); *see also Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75, 102 S.Ct. 752, 759-60, 70 L.Ed.2d 700 (1982).[6]

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[6] Intervenor ACCA contends that the Postal Service has waived its right to object to prudential standing because of its notice in the Federal Register announcing the ICM service:

> Since the Postal Rate Commission does not have jurisdiction to challenge over international rates, the Postal Service's competitors cannot challenge ICM or any other international rates in that forum. However, the Postal Service's competitors can seek judicial review of ICM rates just like they can seek judicial review of other international rates.

58 Fed.Reg. 29778, 29782 (1993).

Despite the Postal Service's statement inviting judicial review, it is uncertain whether prudential standing may be waived. The Supreme Court has given mixed signals. In *Craig v. Boren*, 429 U.S. 190, 192-94, 97 S.Ct. 451, 454-55, 50 L.Ed.2d 397 (1976), the Court hinted that the first prudential standing requirement–which requires a party to assert its own rights, not the rights of others–could be waived by a defendant. *See Elkin v. Fauver*, 969 F.2d 48, 52 n. 1 (3d Cir.) (citing *Craig* for the proposition that "prudential standing [is] not jurisdictional"), *cert. denied*, ___ U.S. ___, 113 S.Ct. 473, 121 L.Ed.2d 379 (1992); *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 128-29 (7th Cir.1989) (similarly citing *Craig*). But, in later cases, the Supreme Court has indicated plaintiffs always must satisfy the prudential standing rules. In *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 n. 8, 106 S.Ct. 1326, 1334 n. 8, 89 L.Ed.2d 501 (1986) (citing *Warth v. Seldin*, 422 U.S. 490, 517-18, 95 S.Ct. 2197, 2214-15, 45 L.Ed.2d 343 (1975)), the Court stated:

> The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the

1.

The first step in satisfying prudential standing is for the litigant to demonstrate that it has asserted its "own

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propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

Furthermore, recent Supreme Court opinions have held broadly that a party may never waive standing, but they have not expressly cited prudential standing. *See, e.g., United States v. Hays*, ___ U.S. ___, ___, 115 S.Ct. 2431, 2435, 132 L.Ed.2d 635 (1995) ("The question of standing is not subject to waiver. . . ."); *National Org. for Women, Inc. v. Scheidler*, ___ U.S. ___, ___, 114 S.Ct. 798, 802, 127 L.Ed.2d 99 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.").

From these cases, many of our sister circuits have determined that prudential standing cannot be waived. *See Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir.1994) ("We find no authority for the plaintiffs' argument that prudential standing requirements may be waived by the parties. Recognizing a distinction between prudential and constitutional standing requirements in this context might give careless parties power to override congressional intent."); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n. 2 (D.C.Cir.1994) ("Standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded."); *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir.1994) (quoting *National Wildlife Fed'n v. United States*, 626 F.2d 917, 924 (D.C.Cir.1980)) ("[A]ppellee's purported waiver of prudential standing challenge is necessarily ineffective because standing implicates federal jurisdiction."). At least one circuit has resolved the issue differently. *See Lindley for Lindley v. Sullivan*, 889 F.2d 124, 128-29 (7th Cir.1989) ("Because the Secretary failed to suggest in the district court that prudential considerations should bar David from suing on his parents' behalf, we cannot consider these arguments here.").

legal interests rather than those of third parties." *Wheeler*, 22 F.3d at 538; *see also Valley Forge*, 454 U.S. at 474, 102 S.Ct. at 759-60; *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The Postal Service alleges that UPS does not meet this first requirement because it has sued under provisions of the PRA that purportedly exist to protect users of the mail, not competitors: "Because plaintiff does not claim to be injured as a mailer, it may not challenge alleged violations of statutory provisions that protect mailers from undue discrimination." Appellant's Brf. at 14.

Our jurisprudence has not decisively settled the matter. Recently, we raised the matter of constitutional and prudential standing, even when the parties agreed that standing existed. *See Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 537 (3d Cir.1994) (citation omitted) ("[W]e have an independent obligation to consider jurisdictional issues, and 'the doctrine of standing . . . goes to the subject matter jurisdiction of the district court and the validity of its judgment *ab initio*.' "); *see also Bennun v. Rutgers State Univ.*, 941 F.2d 154, 168 (3d Cir.1991) (referring to "those constitutional and prudential [standing] limitations that restrict a court's power to act and so must be resolved before we can proceed further on the merits"), *cert. denied*, 502 U.S. 1066, 112 S.Ct. 956, 117 L.Ed.2d 124 (1992). But in *Elkin*, 969 F.2d at 52 n. 1, while defendants did not challenge plaintiff's standing, we analyzed the issue because of our "independent obligation to ensure that federal jurisdiction is present in cases that come before us." Although we found that plaintiff satisfied the Article III standing requirements, we declined to decide whether he satisfied the prudential rules. *Id.*; *see also Ditri v. Coldwell Banker Residential Affiliates, Inc.*, 954 F.2d 869, 872 (3d Cir.1992) ("We find it unnecessary to decide the so-called standing issue which would, at best, only involve prudential standing.").

Because we determine that UPS has standing here, we need not resolve the issue of whether prudential standing may be waived.

We believe the Postal Service confuses this first element of prudential standing, that plaintiff assert its own rights, with the third element, that plaintiff's complaint be within the "zone of interests" the statute was designed to protect or regulate. *See, e.g., Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, ___ U.S. ___, ___, 115 S.Ct. 1278, 1283, 131 L.Ed.2d 160 (1995). Under the zone of interests test, a plaintiff must demonstrate the "interest he seeks to vindicate is arguably within the 'zone of interests to be protected or regulated by the statute' in question." *See id.* (citations omitted); *see also infra* part III.B.3. The first element only mandates that litigants assert their own legal rights, not those of others. *Wheeler*, 22 F.3d at 538. This test generally comes into play in those cases in which a party seeks to challenge agency action that affects another party. *See, e.g., id.* at 539 (holding that plaintiff "fails to satisfy the prudential requirements for standing because she improperly is seeking to vindicate the rights of a third-party, the United States").

In this case, as we have noted, the Postal Service has granted UPS and other delivery companies the right to compete in the delivery of international mail. *See* 39 C.F.R. §§ 320.6, 320.8 (1994); *see also supra* part II. If the ICM service is permitted, UPS alleges it would be injured in the exercise of its right to deliver such mail, a point the Postal Service has not contested on appeal. Therefore, we believe UPS is properly asserting its "own legal interests." *Wheeler*, 22 F.3d at 538.

2.

The second prudential standing consideration admonishes courts to "refrain from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances.' " *Id.* For example, the Supreme Court has denied standing, *inter alia*, in cases in which plaintiffs sued to protest the Vietnam War, *see Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220, 94 S.Ct. 2925, 2932, 41 L.Ed.2d 706 (1974) ("[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public. . . . "); or to challenge the legality of the Central Intelligence Agency, *see United States v. Richardson*, 418 U.S. 166, 175, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974) (citation omitted) (rejecting plaintiff's attempt to "employ a federal court as a forum in which to air his generalized grievances about the conduct of government"). We hold that this dispute is not the type of "generalized grievance" that poses a barrier to standing.

3.

Finally, litigants must demonstrate their interests fall "arguably within the 'zone of interests to be protected or regulated by the statute' in question." *See Newport News Shipbuilding*, ___ U.S. at ___, 115 S.Ct. at 1283 (citations omitted); *see also Wheeler*, 22 F.3d at 538. This element represents the primary focus of the parties' dispute over standing.

In *Association of Data Processing Service Organizations, Inc. v. Camp.*, 397 U.S. 150, 153, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970), the Supreme Court formulated the

"zone of interests" element of standing. In *Data Processing*, sellers of data processing services challenged a Comptroller of the Currency ruling that permitted national banks to offer data processing services to their customers. Plaintiffs contested the ruling as contrary to a statute barring bank service corporations from engaging in "any activity other than the performance of bank services for banks." *Id.* at 155, 90 S.Ct. at 831 (citation omitted). The Supreme Court found plaintiffs had standing because their interests were within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153, 90 S.Ct. at 830.[7] Similarly, in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), the Court held a trade association of securities brokers had standing to challenge a decision by the Comptroller that national banks could operate discount brokerage services in locations outside of their home states. *Id.* at 394-403, 107 S.Ct. at 754-759. The Comptroller claimed the trade association did not have standing because it was not within the "zone of interests" of the McFadden Act, which limited national banks to conducting general business in their home states. But the Court held it was essential to consider the "zone of interests" of both the

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[7] *See also Investment Co. Inst. v. Camp*, 401 U.S. 617, 621, 91 S.Ct. 1091, 1094, 28 L.Ed.2d 367 (1971) (holding that association of investment companies had standing to challenge regulation authorizing banks to operate collective investment funds); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46, 91 S.Ct. 158, 159, 27 L.Ed.2d 179 (1970) (holding that travel agents had standing to challenge decision to allow banks to provide travel services to their customers).

McFadden Act and the National Bank Act, which the McFadden Act had amended. The Court stated, "As *Data Processing* demonstrates, we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act." *Id.* at 401, 107 S.Ct. at 758. Furthermore, as in prior cases, the Court held that "competitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings." *Id.* at 403, 107 S.Ct. at 759.

Although *Clarke* noted the zone of interests "test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff," *id.* at 399-400, 107 S.Ct. at 757 (footnote omitted), recent Supreme Court jurisprudence suggests a somewhat stricter test. *See, e.g., Chem Serv., Inc. v. Environmental Monitoring Sys. Lab.*, 12 F.3d 1256, 1262 (3d Cir.1993) ("Most recently, the Court has taken a stricter view of what statute or statutes should be considered as 'relevant' for the purpose of applying the zone of interest test."). The prominent example of this stricter approach is *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991).

In *Air Courier Conference*, unions representing postal workers challenged a Postal Service regulation that suspended the postal monopoly to permit "international remailing," the practice of "bypassing the Postal Service and using private courier systems to deposit with foreign postal systems letters destined for foreign addresses." *Id.* at 520, 111 S.Ct. at 915-916. The Court of Appeals for the

District of Columbia Circuit had found standing because the PRA, the statute also at issue in this case, provided protections for workers while recodifying the Private Express Statutes ("PES"), which governed the postal monopoly over mail delivery. Thus, the D.C. Circuit concluded, the employees' interests were within the "zone of interests" of the PRA. *Id.* at 521-22, 111 S.Ct. at 916-17.

The Supreme Court reversed, holding that the Court of Appeals had erred in looking at the entire PRA in applying the "zone of interests" test. The Court stated:

> The only relationship between the PES, upon which the Unions rely for their claim on the merits, and the labor-management provisions of the PRA, upon which the Unions rely for their standing, is that both were included in the general codification of postal statutes embraced in the PRA. The statutory provisions enacted and reenacted in the PRA are spread over some 65 pages in the United States Code and take up an entire title of that volume. We said in *Lujan* that "the relevant statute [under the APA] of course, is the statute whose violation is the gravamen of the complaint." To adopt the unions' contention would require us to hold that the "relevant statute" in this case is the PRA, with all of its various provisions united only by the fact that they deal with the Postal Service. But to accept this level of generality in defining the "relevant statute" could deprive the zone-of-interests test of virtually all meaning.
>
> Unlike the two sections of the National Bank Act discussed in *Clarke, supra,* none of the

> provisions of the PES have any integral relationship with the labor-management provisions of the PRA.

Id. at 529-30, 111 S.Ct. at 921 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886, 110 S.Ct. 3177, 3187-88, 111 L.Ed.2d 695 (1990) (citation omitted)). Accordingly, the Supreme Court held the unions lacked standing to bring their claim.[8]

The Postal Service contends that *Air Courier Conference* dictates that UPS be denied standing in this case.[9] It alleges the purposes behind the PRA sections involved here, 39 U.S.C. §§ 101(d), 403(b)-(c), and 407(a),[10] were not to protect competitors of the Postal Service. Instead,

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[8] Under 39 U.S.C. § 410(a), the Postal Service is not covered by chapters 5 and 7 of Title 5, the provisions of the Administrative Procedure Act that involve "Administrative Procedure" and "Judicial Review." In *Air Courier Conference*, the Supreme Court declined to determine whether § 410(a) exempts the Postal Service from judicial review under the APA, holding that the Postal Service had waived the issue. 498 U.S. at 522-23 & 523 n. 3, 111 S.Ct. at 916-18, 917 n. 3. *But see id.* at 531-32, 111 S.Ct. at 921-22 (Stevens, J., dissenting). Similarly, although the Postal Service briefly mentions the issue in a footnote, *see* Appellant's Brf. at 11 n. 3, it states it is "content" to have this case judged under the "zone of interests" test. *See* Appellant's Reply Brf. at 3 n. 1. Thus, we consider the matter waived.

[9] In *Air Courier Conference*, the trade association ACCA intervened on behalf of the Postal Service and argued the unions lacked standing, leaving the Postal Service only a "nominal[ ]" litigant. 498 U.S. at 520, 522, 111 S.Ct. at 915-16, 916-17. Ironically, the Postal Service in this case is attempting to use that decision against ACCA so as to deny it the right to intervene and UPS the right to litigate.

[10] For the text of these sections, see *supra* notes 1-3.

the Postal Service claims that §§ 101(d) and 403(b)-(c), which generally require fairness in establishing postal rates, were intended to protect mailers. Furthermore, the Postal Service argues that § 407(a) was meant to protect the president's foreign policy authority, not the interests of private Postal Service competitors. Thus, the Postal Service asserts, UPS should be denied standing here.

We believe the Postal Service misconstrues the lessons of *Air Courier Conference* and its predecessors. These cases do not require that plaintiffs be among the intended beneficiaries of the statute under which they are suing. *See, e.g., Clarke,* 479 U.S. at 399-400, 107 S.Ct. at 757 (requiring "no indication of congressional purpose to benefit the would-be plaintiff"); *Schering Corp. v. FDA,* 51 F.3d 390, 395 (3d Cir.1995) ("The [zone of interests] test, however, is not so stringent that it requires the would-be plaintiff to be specifically targeted by Congress as a beneficiary of the statute."). Even *Air Courier Conference* merely required an "integral relationship" between the statutory provisions plaintiffs claim have been violated and the provisions under which plaintiffs claim standing. *Air Courier Conference,* 498 U.S. at 530, 111 S.Ct. at 921 (noting that "none of the provisions of the PES have any integral relationship with the labor-management provisions of the PRA");[11] *see also Chem Serv., Inc.,* 12 F.3d at

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[11] In view of the "integral relationship" language, we do not interpret *Air Courier Conference* as establishing a strict zone of interests test contrary to previous Supreme Court precedent, such as *Clarke,* where the Court stated that the zone of interests "test is not meant to be especially demanding." 479 U.S. at 399, 107 S.Ct. at 757. *Air Courier Conference,* we note, merely held that a recodification of an entire title of the United States Code,

1264-65 (upholding standing where statutes found to have an "integral relationship" with each other (quoting *Air Courier Conference*, 498 U.S. at 530, 111 S.Ct. at 921)).

In this case, we believe an "integral relationship" exists among the relevant statutory provisions. Sections 101(d), 403(b)-(c), and 407(a) provide procedures for the manner in which postal rates may be adopted and the types of rates that will and will not be permitted. As we noted *supra* in part II, the history of the Postal Service demonstrates that Congress understood that statutes setting postal rates were inextricably linked with those governing the postal monopoly. *See Air Courier Conference*, 498 U.S. at 526-27, 111 S.Ct. at 919-20 (citing Act of Mar. 3, 1845, 5 Stat. 732). Both types of statutes were intended to affect competitors. *See id.*

In fact, in *Air Courier Conference*, the Supreme Court recognized that competitors fall within the zone of interests of the postal monopoly statutes. *See id.* at 528 n. 5, 111 S.Ct. at 920 n. 5 ("The PES are competition statutes that regulate the conduct of competitors of the Postal Service. The postal employees for whose benefit the Unions have brought suit here are not competitors of either the Postal Service or remailers."). Although the

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covering hundreds of statutory provisions developed over the course of two centuries, did not constitute one "statute," within the meaning of the zone of interests test. *See Air Courier Conference*, 498 U.S. at 529-30, 111 S.Ct. at 921 ("The statutory provisions enacted and reenacted in the PRA are spread over some 65 pages in the United States Code and take up an entire title of that volume. . . . [T]o accept this level of generality in defining the 'relevant statute' could deprive the zone-of-interests test of virtually all meaning.").

Supreme Court noted that "[e]mployees have generally been denied standing to enforce competition laws because they lack competitive and direct injury," *id.*, it reiterated that "competitors of regulated entities have standing to challenge regulations." *Id.* at 529, 111 S.Ct. at 920. In this case, it is undisputed that UPS is a competitor of the Postal Service. Because the regulation at issue involves Postal Service rate-making – a fundamental means of affecting competition, as we noted *supra* in part II – UPS has standing to challenge it. Such standing is all the more clear in cases, like this one, where the agency that is promulgating the regulation is also the "competitor" whose interests are being advanced.

These statutes, governing the postal monopoly and postal rate-making, are on a different footing than the labor-management provisions under which plaintiffs claimed standing in *Air Courier Conference*. Those labor provisions were a new feature of the 1970 Act, unrelated to the postal monopoly provisions that had existed for more than a century. *See Air Courier Conference*, 498 U.S. at 524-28, 111 S.Ct. at 918-20. But as we have noted, the relationship between the postal monopoly and rate-making rules – and their effect on competitors – has existed for most of the two-hundred year history of the postal statutes. *See supra* part II.

Furthermore, while the Supreme Court has recognized competitors have an interest in enforcing the postal monopoly statutes, Congress has provided that competitors are within the "zone of interests" of the postal rate-making statutes. The PRA expressly requires that the Postal Rate Commission, in recommending rates, consider the effect of increases on, *inter alia*, "enterprises in

the private sector of the economy engaged in the delivery of mail matter other than letters." 39 U.S.C. § 3622(b)(4). The same section also requires the Commission to consider the "policies of this title," thereby incorporating the statements of "[p]ostal policy" of § 101, which is one of the provisions under which UPS has filed suit. Thus, we believe competitors such as UPS fall within the "zone of interests" of these rate-making statutes.

In fact, we believe the Postal Service has largely conceded the issue. In its brief, the Postal Service admitted that competitors would have standing to sue under §§ 101 and 403 if they alleged that the rates set were a "predatory attempt to destroy competition." *See* Appellant's Brf. at 16. In conceding standing in this context, the Postal Service necessarily admits that protecting competitors from economic injury caused by illegal regulations falls within the zone of interests of these statutory provisions. We fail to see why competitors would be within the zone of interests if §§ 101 and 403 were violated by the Postal Service's predatory rate pricing but not if the same provisions were violated by the Postal Service's establishment of unfair or inequitable rates.

In evaluating the PRA's rate-making provisions, it appears that Congress was concerned with balancing certain societal interests: those of government, various categories of mailers, and private competitors. Recently we faced a similar situation in *Schering Corp. v. FDA*, 51 F.3d 390 (3d Cir.1995), in which a drug manufacturer challenged the FDA's approval of a regulation that permitted its competitors, manufacturers of generic drugs, to use an abbreviated application procedure. In affirming the drug manufacturer's standing, we recognized the relevant Act

"reflect[ed] a statutory compromise of the competing concerns" of the public and of various drug manufacturers. *Id.* at 396 (citation omitted). Similarly, we view the sections of the PRA governing postal rates as striking a balance between competing concerns. Although we understand a fundamental purpose of the PRA was to make the Postal Service more competitive, we note that Congress also expressed some concern for private competitors of the Postal Service. *See, e.g.*, 39 U.S.C. § 3622(b)(4). Accordingly, we hold that UPS falls within the "zone of interests" of these statutory provisions generally governing postal rates.[12]

IV.

Turning to the merits, we address the district court's holding that the Postal Service's promulgation of the regulation establishing the ICM service violated several provisions of the PRA. *See UPS Worldwide Forwarding, Inc. v. United States Postal Serv.*, 853 F.Supp. 800, 804-06 (D.Del.1994). To understand these provisions, it is necessary to consider the framework of the rate-making sections of the PRA and how the ICM service fits within this statutory scheme.

A.

As we have noted, a fundamental change wrought by the PRA was to transfer rate-making authority from Congress to the Postal Service and related agencies. *See supra*

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[12] For the same reasons we hold UPS to have standing, we find that ACCA has standing to intervene in this case.

part II. For domestic rates, the PRA established a complex process whereby the Postal Service proposes rates, the Postal Rate Commission considers the proposals and offers its recommendations, and the Governors of the Postal Service act on the recommendations. *See Air Courier Conference of America v. United States Postal Serv.*, 959 F.2d 1213, 1216 (3d Cir.1992) (citing various provisions of the PRA). In making its recommendations, the Commission is instructed to consider numerous factors listed in the PRA, 39 U.S.C. § 3622(b), and it must conduct a hearing to allow the Postal Service and public to testify. *Id.* § 3624. For certain types of mail, such as the different classes of mail for letters, the Postal Service must establish a rate that is "uniform throughout the United States, its territories, and possessions." *Id.* § 3623(d); *see also id.* § 3683 (prescribing "[u]niform rates for books; films; other materials").

In contrast to the domestic rate-making procedure, the PRA's international rate-making rules are a model of simplicity. The PRA provides:

> The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries.

39 U.S.C. § 407(a). No proposals need be made and considered by other bodies, no public hearings held, and no specific criteria considered. Instead, the Postal Service need only "establish" international rates, with the President's consent. We believe the differences between the

domestic and international rate-making procedures demonstrate that Congress intended the Postal Service to have significant authority and flexibility in establishing the rates for mail sent abroad.

B.

Pursuant to the PRA statutory scheme, the Postal Service promulgated the ICM service for international mailers. *See* 58 Fed.Reg. 29778 (1993). In publishing its interim regulation, the Postal Service offered two primary reasons for the ICM service. First, it explained that other countries have adopted varying charges on mail sent from the United States, with some based on weight and others on volume. A uniform price for overseas mail, particularly for large-volume customers, meant that "some customers face[d] published rates disproportionate to the costs that the Postal Service would incur in providing those customers with the services in question. . . . " 57 Fed.Reg. 30651, 30652 (1992). The Postal Service explained:

> Until relatively recently, the most significant components of the costs incurred by the Postal Service in connection with its international operations, namely transportation expenses and the charges imposed by foreign postal administrations to deliver U.S.-origin mail (terminal dues), were based exclusively on weight. Although transportation expenses are still a function of weight, the postal administrations of countries to which much U.S. mail is sent have implemented terminal dues arrangements that recognize that mail processing costs vary by volume as well as by weight. Moreover, the

> Postal Service currently is charged terminal dues by foreign postal administrations using four different methods of calculation. Consequently, the Postal Service incurs substantially different costs for delivering mail to different countries. Due to uniform pricing, however, the Postal Service's rates do not reflect country-specific costs to the extent possible. Similarly, uniform rates do not generally take into account differences in how mail is prepared or where it is tendered, both of which can significantly affect costs.

Id. (footnote omitted).

Second, because of the regulation permitting private couriers to deliver international mail, the Postal Service faced increasing competition from companies attempting to lure mailers by "implementing flexible rate structures and customer-specific service offerings." *Id.* The Postal Service noted:

> This flexibility enables the Postal Service's competitors to tailor service features to individual customers and to price those features on a partially or completely disaggregated basis. In contrast, traditional Postal Service pricing policies and practices, whereby the Postal Service generally treats all current and potential customers identically and uses averaged costs when setting rates, are not designed to deal with a competitive environment. The expanded alternatives available to customers and the improved attractiveness of those alternatives have made it increasingly difficult for the Postal Service to sell its services to a varied group of customers using a single published schedule of rates. To the extent that uniform pricing prevents the

> Postal Service from attracting new customers and keeping existing customers, all of the Postal Service's other users suffer by having to pay more for their postal services.

Id.

Despite its reasons for implementing the program, the Postal Service determined that it would not be feasible to offer ICM service to everyone "regardless of size or mailing patterns." *Id.* at 30653. The Postal Service estimated substantial costs to negotiate and implement the ICM agreements; expenses were high enough so that "for all but the largest volume customers, those costs in many instances could be greater" than the Postal Service earned from the ICM program. *Id.* Furthermore, the Postal Service expected to benefit from economies of scale generated by large-volume customers that would not occur with smaller mailers. As it noted, "[I]ncreased volumes amplify the beneficial effects of flexible pricing." *Id.* Because ICM agreements vary depending upon the level of services required by individual customers, ICM rates may be higher, lower, or the same as ordinary public rates.

C.

Despite the flexibility accorded the Postal Service in the international arena, *see supra* part IV.A, the PRA contains several general statements of policy, duties, and powers – such as prohibitions on discrimination and requirements of fairness – that serve as additional limitations on both domestic and international rates. *See 57 Fed.Reg. 30651, 30652 (1992) (listing, inter alia,* §§ 101(d)

and 403(c) as restricting rates). It is these general statutory statements of "policy" and "duties" on which UPS relies in attacking the ICM program. We will consider each of these sections in turn.

1.

Section 101 opens the PRA, outlining general statements of "Postal policy." Subsection (d) provides: "Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." A similar general requirement is contained in § 403(c), which lists the "[g]eneral duties" of the Postal Service:

> In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

The district court found the ICM service violated these provisions because, to qualify for the program, customers must be capable of mailing one million pounds of international mail or paying two million dollars in international postage per year, but they need not actually mail or pay any specified amounts. *See* 58 Fed.Reg. 29778. The district court stated:

> Under the ICM system, small-volume mailers who are not able to meet the threshold capacity requirements of the ICM agreements are not able to gain the benefit of an individually negotiated, lower rate. The costs are not apportioned

> fairly, because under the ICM, there is no requirement that the large-volume mailer actually deliver more than the small-volume mailer.

UPS Worldwide Forwarding, 853 F.Supp. at 805. The court found this set of circumstances discriminated unreasonably against small-volume mailers. *Id.* In so holding, the court stated that "[s]eemingly, there is no reasonable explanation as to why the Postal Service uses capability as a criteria rather than actual performance." *Id.* We disagree.

We believe the Postal Service has offered a reasonable explanation for its business decision to require that mailers be "capable" of tendering a certain threshold amount of mail, rather than mandating that potential customers agree up front to actually tender that minimum. As counsel explained at oral argument:

> To require a commitment would just sort of drive [potential customers] off. I mean, if you say we are not giving you this business until you commit to it, then you never get the business.
>
> It is better to make them the offer, get them to try the business, and then in practice my client informs me, once you get the business of a big company, you tend to get all its business.

Tr. at 44-45. We believe this provides a logical and reasonable explanation for the Postal Service's business decision. UPS does not contend the Postal Service's explanation fails to pass muster in an economic sense; it merely argues the Postal Service does not have the authority to make such business judgments. But Congress repeatedly indicated that a primary purpose underlying

the PRA was to require the Postal Service to discard its system of political patronage and bureaucratic decision-making in favor of modern business practices. *See infra* part IV.D. We see nothing in the PRA that prevents the Postal Service from innovative attempts to increase its business and profits, as long as it stays within the bounds of the relevant statutes.

As we have noted, § 101(d) provides that "[p]ostal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." The determination whether a particular rate is "fair" or "equitable" is not capable of precise definition, but we do not view the ICM service as unfair or inequitable. The program may benefit large-volume mailers over their smaller counterparts because of economies of scale. That the Postal Service chose to offer the program to those "capable" of tendering a certain minimum level of mail or dollars, instead of those that actually so deliver, reflects a reasonable business decision about the most effective means to solicit new customers.

Similarly, we do not view the ICM service as violative of § 403(c)'s ban on "undue or unreasonable discrimination" or "undue or unreasonable preferences." We cannot ignore that the "undue or unreasonable" language, twice repeated in § 403(c), means that reasonable discrimination and preferences among users of the mail are permitted. Allowing a limited class–the relatively small percentage of large-volume mailers eligible to participate in the ICM program–to negotiate individual service plans at individual rates does not appear on its face to be "undue or unreasonable." As we have noted, it permits the Postal Service to compete more effectively for the

business of large-volume mailers, *see supra* part IV.B, fulfilling congressional intent. *See infra* part IV.D.[13]

As with the terms "fair" and "equitable" in § 101(d), we find it difficult to define the contours of what constitutes "undue or unreasonable" discrimination or preferences. We note that other courts, when confronting this section, have accorded postal authorities broad latitude. In *Mail Order Ass'n of America v. United States Postal Service*, 2 F.3d 408, 434 (D.C.Cir.1993), magazine publishers challenged the Postal Rate Commission's decision not to adopt a "zoned" second-class mail rate, i.e., a rate that would increase with distance. Because the Commission's decision had not violated any specific rate provision of the PRA, the Court of Appeals for the District of Columbia reasoned that:

> The question, then, is whether the Commission was arbitrary in its ultimate trade-off between the cost considerations that pointed toward zoning, and the competing values that it ultimately favored. Any such arbitrariness would presumably violate 39 U.S.C. § 403(c)'s prohibition of "undue or unreasonable preferences."

Id. at 435-36. The court noted that "[t]he refusal to zone indeed appears unsupported by any cost principle." *Id.* at 436. Nevertheless, the court ultimately held that, because

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[13] It is instructive that the Universal Postal Union, the United Nations agency governing international mail, permits postal authorities to "give preferential rates to major users of the Post." *See* 58 Fed.Reg. 29778 (citing UPU Convention, art. 20, ¶ 15).

the Commission had valid reasons for its decision, it had not violated § 403(c). *Id.* at 437.[14] Similarly, as we noted

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[14] Other courts have reached similar conclusions. In *Aimes Publications, Inc. v. United States Postal Service*, Civ. A. No. 86-1434, 1988 WL 19618, at *6 (D.D.C. Feb. 23, 1988), the court noted the Postal Service's enforcement of its second-class statutory rules apparently was "at best, uneven," but it found no violation of § 403(c). The court stated that "[t]ypically, the court[s] have given the Postal Service broad discretion in administering the classification scheme, which necessitates differentiating among users." *Id.* at *7 n. 13. And in *Egger v. United States Postal Service*, 436 F.Supp. 138 (W.D.Va.1977), a student challenged a Postal Service policy that provided a different level of service to single students living in university housing than that provided for married students. In upholding the different service levels, the court noted:

> While it is obvious that [§ 403(c)] prohibits undue or unreasonable discrimination among users in the provision of delivery services, it is also equally obvious that the Postal Service may provide different levels of delivery service to different groups of mail users so long as the distinctions are reasonable. The goal sought by the Postal Service in the instant case by their discrimination is the efficient and economical delivery of the mail. The goal is legitimate and the only question before the court is whether the distinctions between the three groups are rationally related to the achievement of the goal.

Id. at 142; *see also Time, Inc. v. United States Postal Serv.*, 710 F.2d 34, 41 n. 8 (2d Cir.1983) (holding that the disparities between the contribution to the Postal Service's fixed costs from each class of mail service "are not so great as to amount to 'undue or unreasonable discrimination among users of the mails' "); *Direct Mail/Mktg. Ass'n, Inc. v. United States Postal Serv.*, 501 F.2d 717, 722 (D.C.Cir.1974) (upholding temporary rate changes that allegedly discriminated against third-class mailers in violation of § 403(c) because the Postal Service action was "manifestly reasonable"); *Ludewig v. Wolff*, 492 F.Supp. 1048, 1049

supra in part IV.B., the Postal Service had equally valid reasons for its decision to create the ICM service.

On its face, then, we believe the ICM service does not violate § 403(c). The regulation promulgating the ICM program requires the Postal Service to "make every ICM service agreement available to similarly situated customers under substantially similar circumstances and conditions." *See* 58 Fed.Reg. 29782. To facilitate that process, the regulation mandates that the Postal Service publish detailed information about each ICM agreement, including the term, rate, type of mail involved, destination country or countries, minimum volume commitments, and descriptions of services to be provided by the Postal Service and mailer. *Id.* We believe the publication of this information will permit competitors and mailers alike to verify that the Postal Service is complying with its mandate not to grant "undue or unreasonable" discrimination or preferences.

2.

As we have noted, § 403 provides the "[g]eneral duties" of the Postal Service. Subsection (b)(2) provides: "It shall be the responsibility of the Postal Service to provide types of mail service to meet the needs of different categories of mail and mail users." The district court held the ICM program violated § 403(b)(2) because it

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(S.D.Tex.1980) (finding no violation of § 403(c) "because the distinctions made by the regulations are reasonably related to the effectuation of the pertinent objectives of the Postal Reorganization Act").

serves "individual" users, not "categories" of users. *UPS Worldwide Forwarding*, 853 F.Supp. at 804-05. We disagree.

The ICM program is open to those customers capable of tendering one million pounds of international mail or paying two million dollars in international postage. We consider that group of customers to be a "category" of mail users, and believe the Postal Service is providing "mail service to meet the needs" of that category of users by offering them the ability to negotiate individualized service plans to meet individual needs. Section 403(b) does not specify that, to meet the needs of a category of users, the Postal Service must give them all the same rate. In fact, the Postal Service may better "meet the needs" of large-volume mailers by offering them individualized service plans at individual rates.

But UPS contends that § 403(b)(2) generally prohibits individually-negotiated rates. Once again, we disagree. As we have noted, § 403(c) bars "undue or unreasonable" discrimination and preferences. That necessarily means that reasonable discrimination and preferences are permitted. *See supra* part IV.C.1. Furthermore, the various domestic mail provisions that require "uniform" rates demonstrate that Congress knew how to mandate uniformity and equality when it desired. *See, e.g.*, 39 U.S.C. § 3623(d) (requiring that rates for each class of letter mail be "uniform throughout the United States, its territories, and possessions"); *id.* § 3683 (prescribing "[u]niform rates for books; films; other materials").

Finally, we fail to understand how the statement of "[g]eneral duties" of the Postal Service could forbid the ICM program. Instead of a restriction on the powers of

the Postal Service, it merely enumerates, as its title indicates, the Service's "[g]eneral duties." Viewing the statutory scheme overall, § 403 was intended to list "[g]eneral duties," while other sections of the PRA specified duties, powers, and limitations. There is nothing in this section that bars the Postal Service from doing more than the minimum required here. Thus, as long as the Postal Service provides service to "meet the needs of different categories of mail and mail users," it also may provide individualized service. *See, e.g.*, 39 C.F.R. § 3001.68, App. A, ¶ 500.021 (describing the Postal Service's established "Custom Designed Service," in which customers negotiate with the Postal Service for specialized pick-up and delivery arrangements).

3.

Section 407(a), governing "[i]nternational postal arrangements," provides that "[t]he Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries." The district court held § 407(a) requires the President to consent to new international postal rates. *UPS Worldwide Forwarding*, 853 F.Supp. at 806. On appeal, neither party disputes this holding. But UPS makes two arguments under § 407(a).

a.

UPS contends the ICM service is prohibited by the phrase, "establish the rates of postage or other charges."

UPS claims that "establish" means to "set up . . . permanently" and "rates" are "standardized prices made available to the public at large." Appellee's Brf. at 25 (citations omitted). Thus, UPS asserts, § 407(a) does not permit the individual rates found in the ICM service. We disagree. If "establish" means creating permanent rates, the Postal Service could never change its rates. We do not believe Congress intended that result. Furthermore, the word "rates" may well indicate, as UPS claims, "standardized prices available to the public at large," but § 407(a) allows the Postal Service to "establish the rates of postage *or other charges*" (emphasis added). We believe the negotiated rates of the ICM service satisfy the latter part of the phrase, if not the former.

b.

UPS also alleges the President never manifested the requisite consent under § 407(a). The Postal Service responds that the President consented by allowing the rates to take effect without objection. Because it is clear that the President never formally consented to the adoption of the ICM service, we must consider the historical practice under the statute.

As we noted, Congress enacted legislation in 1851 permitting the Postmaster General, "by and with the consent of the President," to change the international postal rates set by Congress. *See* Act of Mar. 3, 1851, ch. 20, § 2, 9 Stat. 587, 588; *see also* Act of June 8, 1872, ch. 335, § 167, 17 Stat. 283, 304. The statute remained essentially the same until 1970, when the PRA permitted the "Postal

Service, with the consent of the President," to "establish" those rates.

Neither party has submitted any evidence that, from the adoption of the 1851 Act, the President ever has affirmatively manifested, by word or deed, his consent to changes in international rates. The Postal Service notes that international rates have changed at least sixty times since 1945, all without express presidential approval. *See* Aff. of John F. Alepa, Manager of Pricing, U.S. Postal Service, App. at 55-62; *cf. Air Courier Conference of America v. United States Postal Serv.*, 959 F.2d 1213, 1222-23 (3d Cir.1992) ("Before the [PRA] was passed, international rates had been set by the Postmaster General's administrative fiat. . . . "). Thus, the undisputed historical record indicates the President and postal authorities have long interpreted § 407(a) as not requiring the affirmative consent of the President.

In its brief, UPS argues the Postal Service has offered no evidence that the President agrees with its interpretation of the § 407(a) consent provision. *See* Appellee's Brf. at 41-42. But after submission of UPS's brief, the President published a memorandum in the Federal Register, delegating until completion of this appeal his authority under § 407(a) to establish postage rates. 59 Fed.Reg. 65471 (1994). The memorandum provides:

> [T]he Government argues that the explicit consent of the President is not required. In the view of the Government, to the extent that 39 U.S.C. 407(a) does require the President to consent, it does not require that consent be given in any particular manner. The Government's position is that the failure of the President to object to the

> establishment of international postage rates and other charges is consent to the establishment of such rates and other charges. This has been the practice of the Government for the past 120 years.

Id.

Nevertheless, after viewing the unique history of the application of § 407(a), we believe the President has demonstrated how he has manifested his consent to action by the Postal Service. We decline UPS's invitation to prescribe certain procedural steps the President must take in this regard. Although such guidance might be necessary with different statutes, agencies, or branches of government, we believe it is inappropriate in this context. Although the President and the Postal Service now agree he may consent to international postal rate changes merely by not objecting, we rely only on the historical practice under § 407(a) in upholding the ICM service.[15]

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[15] UPS contends the Postal Service never argued before the district court that the President consented to the ICM service; thus, UPS claims, the Postal Service has waived this argument. Although the Postal Service disputes that it waived the issue, we need not decide the question. We may "review a waived issue under exceptional circumstances," such as when the "public interest" so requires. *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 117 (3d Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1645, 123 L.Ed.2d 267 (1993). Because this case involves the President's authority to determine the manner of his consent to agency action and the validity of more than a century's worth of international postal rates, we hold that "exceptional circumstances" exist here.

D.

In challenging the Postal Service, its competitors characterize it as a "public service" and "essentially a public utility." *See* Appellee's Brf. at 11, 22. In the domestic area, we believe those descriptions are apt. In some ways, the skepticism surrounding the ICM service exists because the program seems antithetical to traditional notions of the Postal Service. We expect to pay the same price for a postage stamp as everyone else, not to have to bargain for the best rate. In this sense, the Postal Service is properly compared to a public utility that charges the same rate to all customers.

But the Postal Service retains its centuries-old monopoly only in the domestic market. In the international arena, Congress has freed the Postal Service from the constraints that protect domestic mail rates. *See* 39 U.S.C. § 407(a); *supra* part IV.A. Without a monopoly to protect its international business, *see* 39 C.F.R. §§ 320.6, 320.8, the Postal Service now faces competition from UPS and other entities. *See supra* part IV.B. Thus, the reasons that may compel a uniform rate for postage in the United States no longer apply to large-volume international mailers.

In enacting the PRA, Congress repeatedly explained the fundamental reason for the dramatic changes mandated by the Act; it wanted the Postal Service to operate less like a bureaucratic agency and more like a business. The relevant committee reports repeat this principle again and again. *See, e.g.*, H.R. No. 1104, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3660 ("The Postal Service is a public service but there is no reason

why it cannot be conducted in a businesslike way and every reason why it should be.").[16]

While Congress hoped to achieve efficiency in postal operations by enacting the PRA, it also sought innovation. As the House Report noted, the Act "envisions a national postal service that is forever searching for new markets and new ways by which the communication needs of the American people can be served." H.R. No. 1104, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. at 3668-69.[17] We believe the ICM service constitutes an appropriate part of that effort.

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[16] *See also H.R.Rep. No. 1104, 91st Cong., 2d Sess. (1970), reprinted in* 1970 U.S.C.C.A.N. 3649, 3650 (The PRA is intended to "[e]liminate serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial, and personnel policies that are outmoded, unnecessary, and inconsistent with the modern management and business practices . . . . "); *id.* at 3653 ("Top management must be given authority, consistent with its responsibilities, to provide an efficient and economical postal system. Postal management has been severely and unjustly hampered in its efforts to administer the Department in a businesslike way."); *id.* at 3654 (The bill provides "authority to conduct the affairs of the Postal Establishment on a business like basis. . . . "); *id.* at 3665 ("The mandate that the Postal Service must be self-supporting is essential if postal affairs are to be conducted with reasonable economy and efficiency."); S.Rep. No. 912, 91st Cong., 2d Sess. 3 U.S.Code Cong.Serv.1970, p. 3649 (1970) ("[P]ostal management must now be given the unfettered authority and freedom it has been denied for years to maintain and operate an efficient service."); *id.* ("[T]he laws controlling the governance of the [Post Office] Department have become excessively restrictive and [ ] it is not too soon for a complete break with the past.").

[17] *See also* H.R.Rep. No. 1104, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3657 ("The Postal Service is empowered to engage in research and development programs

V.

As a final matter, we consider the proper level of deference to be accorded the Postal Service's interpretation of the PRA. The Postal Service contends its regulations are to be given "controlling weight" as long as they represent a "reasonable interpretation" of the statute, pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). We confronted this general issue in *Air Courier Conference v. United States Postal Service*, 959 F.2d 1213, 1223-25 (3d Cir.1992), and we found *Chevron* to be controlling.

In *Air Courier Conference*, we considered whether the PRA required the Postal Rate Commission to consider any Postal Service change to international rates. 959 F.2d at 1215-16. In deciding the PRA did not require it, we noted the Postal Service and the Commission agreed that the latter agency played no part in international ratemaking. We found the "argument that the Postal Service's

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directed toward the expansion of present postal service and the development of new services responsive to the evolving needs of the United States"); *id.* at 3668 (The PRA "is designed to prevent public service from involving public wastefulness in postal matters. This must be done not only by requiring postal management to operate efficiently and economically, but also by requiring it to seek out the needs and desires of its present and potential customers – the American public."); S.Rep. No. 912, 91st Cong., 2d Sess. 3 U.S.Code Cong.Serv.1970, p. 3649 (1970) (noting prior postal laws "inhibit[ed] innovation and imagination in the management of the Post Office").

bureaucratic bias lessens the need for deference is counter-balanced by the express acquiescence of the Commission in the Postal Service's view." *Id.* at 1225. As UPS notes, such concurring agency views do not exist here.

In reaching our decision in favor of the Postal Service, we have been convinced that Congress intended the PRA to permit the agency to operate more like a private business. *See supra* part IV.D. As the Supreme Court has noted, "[b]y launching 'the Postal Service into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.' " *Loeffler v. Frank*, 486 U.S. 549, 556, 108 S.Ct. 1965, 1970, 100 L.Ed.2d 549 (1988) (citations omitted). Because in this case we construe a Postal Service regulation explicitly designed to "attract customers that currently use its competitors," *see* 58 Fed.Reg. 29778, 29780, it would appear that a reduced level of deference is appropriate here. But we are convinced the ICM service does not contravene the PRA, and so we do not rely on any deference that might be due.

VI.

For the reasons expressed, we will reverse the judgment of the district court.

UPS WORLDWIDE FORWARDING, INC., Plaintiff,

v.

UNITED STATES POSTAL SERVICE, Defendant.

Civ. A. No. 93-340-JLL.

United States District Court,

D. Delaware.

May 16, 1994.

OPINION

LATCHUM, Senior District Judge.

I. BACKGROUND

On July 22, 1993, plaintiff, UPS Worldwide Forwarding, Inc. (hereinafter "UPS"), filed its complaint against defendant, United States Postal Service (hereinafter "POSTAL SERVICE"), alleging that the Postal Service's new international mail agreement, International Customized Mail (hereinafter "ICM") Service, violates various provisions of the Postal Reorganization Act (hereinafter "PRA"), specifically 39 U.S.C. §§ 101(d), 403(b)-(c), and 407(a).[1] (Docket Item ["D.I."] 1.) In response to the Postal

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[1] Section 101(d) states:

> Postal rates shall be established to *apportion the costs* of all postal operations to all users of the mail on a fair and equitable basis. (Emphasis supplied.)

39 U.S.C. § 101 (1980).

Section 403(b) states:

> It shall be the responsibility of the Postal Service – . . . (2) to provide types of mail service to meet the needs of different *categories* of mail and mail users. (Emphasis supplied.)

Service's motion to dismiss for lack of standing, or alternatively, pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted, (D.I. 5), UPS filed its amended complaint on November 2, 1993, alleging more specifically that it was threatened with a substantial loss of business due to the Postal Service's ICM Service. (D.I. 14, ¶¶ 19, 21.) Meanwhile, on October 19, 1993, Air Courier Conference of America/International Committee (hereinafter "ACCA"), an unincorporated membership association consisting of firms engaged in providing letter and parcel delivery services in the United States and between the United States and foreign countries, moved for leave to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. (D.I. 10.) On November 16, 1993, the Postal Service filed its motion to dismiss the amended complaint. (D.I. 17.) UPS responded with its motion for summary judgment, filed January 14, 1994. (D.I. 28.) On April 7, 1994, the Court

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Section 403(c) states:

> In providing services and in establishing classifications, rates, and fees under this title, the Postal Service *shall not*, except as specifically authorized in this title, *make any undue or unreasonable discrimination* among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user. (Emphasis supplied.)

39 U.S.C. § 403 (1980).

Section 407(a) in relevant part states:

> The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries.

39 U.S.C. § 407 (1980).

heard oral argument on plaintiff's motion for summary judgment, defendant's motion to dismiss the amended complaint, and ACCA's motion to intervene. Before the Court now for consideration are the various motions of these parties.

II. FACTS

On May 24, 1993, the Postal Service established its new ICM Service, which is available to customers who are capable of tendering large quantities of international mail. (D.I. 6 at 5.) Specifically, the ICM Service allows the Postal Service to negotiate individually with customers who are capable of mailing annually either one million pounds of international mail or two million dollars of international postage, and the customer must also be capable of tendering such international mail from a single location. (D.I. 6 at 6.)

In its complaint, UPS alleges that: (1) the PRA does not authorize the Postal Service to negotiate individual prices and that international service rates must be uniform for all mailers sending the same type of mail to the same destination (D.I. 14 at ¶¶ 13-18); (2) it is not possible to determine whether the Postal Service is making the same terms available to similarly-situated customers because it does not disclose certain elements of the ICM Service (D.I. 14 at ¶ 22); and (3) the ICM Service has been adopted without consent of the President of the United States as is required by the PRA (D.I. 14 at ¶¶ 26-28).

Defendant, the Postal Service, argues that: (1) UPS lacks standing to challenge the ICM Service (D.I. 18 at 10-18); (2) ICM is not in contravention to the PRA (D.I. 18

at 18-28); and (3) presidential consent is not required (D.I. 18 at 28-38).

Plaintiff seeks a permanent injunction restraining the Postal Service from entering into ICM agreements or from rendering ICM Service and from otherwise rendering international mail service to individual mailers at prices different from the rates established for the public at large. (D.I. 14 at 7-8.)

III. APPLICABLE LAW

As stated above, defendant moved to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) and for lack of standing. Fed.R.Civ.P. 12(b) provides that if a motion is made under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed.R.Civ.P. 12(b). *See also Pfizer, Inc. v. Elan Pharmaceutical Research Corp.*, 812 F.Supp. 1352, 1357 (D.Del.1993). Additionally:

> [S]ince a motion to dismiss for lack of standing does not raise a question going to the merits of the controversy, it may be treated as a motion to dismiss for failure to state a claim for relief, and if matters outside the pleadings are admitted by the court, the motion may be treated as one for summary judgment.

5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1360, at 436 (1990). *See also Pfizer*, 812 F.Supp. at 1357-58. Therefore, the motions to dismiss,

along with the motion for summary judgment, will all be treated as motions for summary judgment. However, since all parties concede that there are no genuine issues of material fact, this case essentially becomes a question of statutory interpretation. The Court will now address the legal issues which are in dispute.

IV. DISCUSSION

A. STANDING

The question of standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). In order to meet the standing requirement, the plaintiff must satisfy the requirements of Article III as well as prudential considerations that have evolved from judicial precedent. *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 471, 102 S.Ct. 752, 757-758, 70 L.Ed.2d 700 (1982).

The constitutional standing requirement has three elements. The plaintiff must show: (1) that it "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"; (2) that the injury is fairly traceable to the challenged action; and (3) that it "is likely to be redressed by a favorable decision." *Valley Forge*, 454 U.S. at 472, 102 S.Ct. at 758 (citations omitted). First, it is undisputed that UPS is a competitor of the Postal Service and that UPS has authority to compete in the international parcel delivery market. 39 CFR § 320.6 (1993). Second, the Postal Service by its own admission has enacted the ICM agreements with the

intent to pull business away from UPS and other international delivery services.[2] As a result of the Postal Service's actions, UPS could lose substantial business in the international postal market. Plaintiff has established that the new ICM service will cause a direct, imminent injury by eroding UPS' client base. Plaintiff has met the causation test, because it is clear that any harm would be attributable to the fact that former UPS customers are now engaging in the ICM service agreements with the Postal Service. Finally, if the Court were to enjoin the ICM agreements, the harm suffered by UPS would be extinguished. Thus, plaintiff has met the constitutional standing requirement.

In order to satisfy the prudential standing requirement: (1) "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"; and (2) "the plaintiff's complaint [must] fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge*, 454 U.S. at 474-75, 102 S.Ct. at 760. First, UPS has a legally protected right to compete in the international parcel delivery market pursuant to 39 C.F.R. § 320.6. The plaintiff is asserting that its legal right to compete is being harmed by the ICM agreements which the Postal Service

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[2] ICM is designed "to attract customers that currently use competitors and would not otherwise use the Postal Service for their international mailings. If the Postal Service is successful, the additional volume will come from competitors, not from the Postal Service's other international services." 58 Fed.Reg. 29778, 29780 (1993).

admits are intended to attract customers from its competitors such as UPS. Second, as the Supreme Court has explained, the "zone of interests" test is not meant to be especially demanding and there does not have to be an indication that Congress, in enacting the PRA, intended to benefit the would-be plaintiff. *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399-400, 107 S.Ct. 750, 757, 93 L.Ed.2d 757 (1987). It is unclear who would have standing to challenge the ICM agreements, if not a competitor. Certainly, a mailer who is able to get a better deal from the Postal Service than from UPS would not challenge the ICM agreements. Additionally, the Postal Service concedes that, "[a]s a competitor of the Postal Service in international mail, UPS has standing to complain of allegedly unlawful rates only to the extent that it is harmed as a competitor." (D.I. 18 at 14.) Therefore, the Court concludes that UPS possesses the requisite standing to bring and maintain this lawsuit.

B. LACK OF AUTHORITY UNDER THE PRA TO ENTER INTO ICM

UPS argues that the ICM agreements violate: (1) sections 403(b)(2) and 407 of the PRA because the Postal Service is required to establish international rates for types of service and for categories of mail and mail users; (2) section 403(c) of the PRA which prohibits the Postal Service from unreasonably discriminating among mailers; and (3) section 101(d) of the PRA because the Postal Service is required to establish rates which apportion the cost of postal operations to all users of mail on a fair and equitable basis.

First, § 403(b)(2) refers to the establishing of *categories* of mail and mail users. Plaintiff argues that since each of the ICM agreements is individually negotiated, the Postal Service has thus failed to set up ascertainable categories which apply to all similarly-situated mailers. Defendant contends that, in fact, each of the individually negotiated agreements is a separate category in and of itself. However, defendant's interpretation of the statute makes the term "category" meaningless. If the Postal Service can establish a new category of mail with each and every one of its customers via a separate ICM agreement, then it is effectively creating individually negotiated rates. It is by no means clear that Congress intended to give the Postal Service the broad-ranging authority that it claims to have in the international rate-making area. The Court finds that the individually negotiated rates thus violate the requirement that mail service meet the needs of different categories of mail and mail users. For this reason, the ICM agreements must be enjoined.

Second, § 403(c) on its face prohibits undue or unreasonable discrimination among users of mail. The Postal Service concedes that the nondiscrimination policies in § 403(c) are applicable to international mail service under § 407. (D.I. 39 at 12.) In order to qualify for an ICM agreement, a customer must be *capable* of tendering either one million pounds of international mail or two million dollars' worth of international postage. Since the mailer who enters into an ICM agreement does not actually have to tender the requested amount, but only be capable of doing so, then a large-volume company will be allowed

to engage in ICM agreements, and a small-volume company will not, even if they both wind up tendering the same amount of mail or postage at the end of the year. Unreasonable discrimination occurs when a large-volume company gets a cheaper rate via an ICM agreement, even though it tenders the same amount or even less mail than a small-volume company. The smaller company cannot gain the benefits of ICM service because it fails to meet the threshold capability requirements of ICM service. Seemingly, there is no reasonable explanation as to why the Postal Service uses capability as a criteria rather than actual performance. The Court finds that the ICM agreements are in violation of § 403(c) and thus must be enjoined.

Third, § 101(d) requires the Postal Service to apportion the costs of its services on a fair and equitable basis. Under the ICM system, small-volume mailers who are not able to meet the threshold capacity requirements of the ICM agreements are not able to gain the benefit of an individually-negotiated, lower rate. The costs are not apportioned fairly, because under the ICM, there is no requirement that the large-volume mailer actually deliver more mail than the small-volume mailer. Thus, the usual justification offered for charging less for a greater volume would not apply in this situation. The Court recognizes that there are some cost-savings on the part of the Postal Service when it deals with large-volume mailers. Therefore, it would not be contrary to the PRA for the Postal Service to offer a cheaper rate to a customer who delivers large quantities of mail. However, in a situation where the customer gets a cheaper rate, but does not have to guarantee a certain volume, it will be the small-volume

companies who are left to subsidize the large-volume companies. Since ICM has the potential to apportion the costs of postal operations in an unfair manner, it violates § 101(d) of the PRA.

C. PRESIDENTIAL AUTHORITY IS NEEDED FOR ICM

Finally, UPS argues that the ICM agreements are contrary to the PRA because the Postal Service has not gained presidential approval as is required by § 407(a): "The Postal Service, ***with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter*** conveyed between the United States and other countries." 39 U.S.C. § 407 (1980) (emphasis supplied). The Postal Service concedes that the President has not consented, but argues that the placement of the comma after the word "conventions" indicates that Congress did not intend for the presidential consent requirement to apply to the second clause of that sentence pertaining to the setting of rates of postage. The Postal Service insists that if presidential consent were required, then the comma would not be present in the statute.

A look at the origin and history of this act is instructive. The precursor to § 407 originated in 1851. The 1851 statute reads as follows:

> And the Postmaster-General, ***by and with the advice and consent of the President of the United States, shall be, and he hereby is, authorized to reduce or enlarge, from time to time, the***

> ***rates of postage*** upon all letters and other mailable matter conveyed between the United States and any foreign country.

Act of March 3, 1851, ch. 20, § 2, 9 Stat. 587, 589 (1851) (emphasis supplied).

Thus, it is clear that the Post Office had authority to change the rates of postage only with the consent of the President. In 1872, a new provision was added to the statute which then read: "[T]he Postmaster-General, ***by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage*** on mail-matter conveyed between the United States and foreign countries." Act of June 8, 1872, ch. 335, § 167, 17 Stat. 283, 304 (1872) (emphasis supplied). The only change which occurred in the 1872 statute was that the Postmaster General could then also negotiate and conclude postal treaties and conventions as well as reduce or increase the rates of postage. However, in both situations, the advice and consent of the President was required. The mere creation of additional authority to negotiate postal conventions with the consent of the President cannot be read to eliminate the preexisting requirement of presidential consent for changes in international postal rates. Rather, in the 1872 statute, Congress continued the requirement that the Postmaster General obtain presidential consent in order to change international postal rates while in that same section granted the Postmaster General the additional authority to conclude postal conventions with the consent of the President.

Finally, in 1970, the statute was changed to its present form – § 407(a). The statute remained virtually

unchanged, but now provided that the Postmaster General could establish rates as opposed to simply increasing or decreasing them. Presidential consent was still required and there is no indication in either the 1872 Act or the 1970 statute that Congress intended to give the Postmaster General the authority to change or set rates without presidential approval.

After tracing the history of the Act, it becomes clear that presidential consent was always required. The only change in the statute was an additional provision which allowed the Postmaster General the authority to negotiate and conclude postal treaties and conventions, also subject to presidential consent.

The Postal Service also contends that it would be redundant for the President to approve a rate after it has already been adopted in a postal convention. This much is true. While the Postmaster General may have implemented the rates set in the conventions without further presidential approval, the Postmaster General did so only once the convention was ratified by the President. Obviously, when the President approves a convention which contains international postal rates, he, of necessity, consents to those rates. For the reasons stated above, the Court finds that presidential consent is required under § 407 when the Postal Service makes new, international postal rates.[3]

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[3] An additional reason for requiring presidential consent is the fact that the setting of international rates involves issues of foreign policy. Since the setting of international rates could potentially affect the relations of the United States with other countries, it is inconceivable that Congress would allow the

D. MOTION TO INTERVENE

A party may permissively intervene pursuant to Fed.R.Civ.P. 24(b)(2)[4] if: (1) the application is timely; (2) the applicant's claim and the main action have a question of law or fact in common; and (3) the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. *Brody By and Through Sugzdinis v. Spang*, 957 F.2d 1108, 1115-16 (3d Cir.1992).

When determining whether the motion was timely, the Court should consider three factors: (1) how far the proceedings have progressed when the applicant seeks to intervene; (2) the prejudice to the other parties which results from the delay; and (3) the reason for the delay. *Karr v. Castle*, 768 F.Supp. 1087, 1091 (D.Del.1991). In the case at bar, the motion to intervene was filed less than three months after the suit was initiated by UPS, less than one month after the Postal Service filed its motion to dismiss, and before any discovery had commenced. In *Chiles v. Thornburgh*, the Court held that a motion to intervene was timely where the motion was filed seven

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Postal Service to have such free reign to set international postal rates.

[4] Fed.R.Civ.P. 24(b) states in relevant part:

> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed.R.Civ.P. 24.

months after the complaint and three months after the defendant filed its motion to dismiss. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir.1989). *See also Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 380 (D.Del.1990) (motion to intervene held to be timely where it was filed well before the close of discovery); *Jet Traders Inv. Corp. v. Tekair, Ltd.*, 89 F.R.D. 560, 568 (D.Del.1981) (although there was no good reason for an eight-month delay between the completion of pleadings and the filing of the motion to intervene, "where discovery has not been completed, [where] there have been no significant decisions on the merits considered or decided, and the parties could not be prejudiced by that delay, the motion must be considered timely"). The Court further considers the fact that the Postal Service has not challenged the timeliness of the motion to intervene. The Court finds that the three-month delay will not prejudice any of the parties in the suit and thus holds that the motion to intervene is timely.

Next, the Court must consider whether there is a question of law or fact in common. In May, 1993, the Postal Service adopted the International Customized Mail Rule, which is being challenged as a violation of the PRA. Air Courier is the trade association of the expedited delivery industry and alleges that it has been and continues to be harmed by this Postal Rule. (D.I. 19 at 3, 12.) Thus, ACCA has asserted a legal interest which is clearly related, if not identical, to the main action.

Finally, as to prejudice or delay, the Court notes that allowing ACCA to intervene will not expand the issues currently being litigated. The Court is unaware of any circumstances, nor has the Postal Service in its opposition

to intervention raised any argument, which would suggest that prejudice or delay would result from allowing ACCA to permissively intervene. For these reasons, the Court will grant ACCA's motion for permissive intervention.[5]

V. CONCLUSION

This Court holds that UPS has the requisite standing necessary to challenge the Postal Service's new ICM agreements. Further, the Court finds that the ICM Service violates various sections of the PRA because: (1) it fails to establish categories of mail and mail users; (2) it unreasonably discriminates among users of the mail; and/or (3) it fails to apportion the costs of postal operations on a fair and equitable basis. Alternatively, the Court holds that the ICM agreements violate the PRA because they fail to have presidential approval as is required by § 407 of the PRA. As such, an injunction will be issued forthwith prohibiting the Postal Service from further engaging

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[5] As the proposed intervenors have noted in their briefs, the Postal Service has not challenged ACCA's motion to intervene on the grounds that ACCA has failed to satisfy the required elements of Rule 24, but rather on the theory that ACCA lacks standing to intervene. The Court has not addressed whether ACCA possesses the requisite standing necessary to have initiated the lawsuit originally. This discussion is not necessary in light of the Court's determination that UPS has standing to challenge the postal regulations and that ACCA satisfies the requirements of permissive intervention. *See Indian Recovery Co. v. The China*, 108 F.R.D. 383, 386 (D.Del.1985) (noting that "[a]n intervenor need not have standing necessary to have initiated the lawsuit").

in any ICM arrangements. Finally, the Court grants ACCA's motion to intervene as a permissive intervenor.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UPS WORLDWIDE FORWARDING INC.,	)	**Civil Action No. 93-340-JLL**
Plaintiff,	)	
v.	)	
UNITED STATES POSTAL SERVICE,	)	
Defendant.	)	

FINAL ORDER

For the reasons set forth in the Court's Opinion entered in this case on this date, it is

ORDERED AND ADJUDGED that:

1. Judgment is hereby entered in favor of plaintiff, UPS Worldwide Forwarding, Inc. (hereinafter "UPS") and against defendant, the United States Postal Service (hereinafter "POSTAL SERVICE") on the Postal Service's motion to dismiss and/or its motion for summary judgment.

2. Summary Judgment is hereby entered in favor of plaintiff, UPS and against defendant, the Postal Service.

3. Defendant, the Postal Service, and its officers, agents, employees, servants, attorneys, and all persons in action, concert, and participation with it are permanently enjoined from entering into International Customized

Mail Service agreements and from rendering to any person or entity the service known as International Customized Mail Service without first complying with 39 U.S.C. §§ 101(d), 403(b-c), and 407(a).

4. Air Courier Conference of America is hereby granted permission to intervene in this action and to file a sur sur reply brief in support of its motion to intervene.

Dated: May 16, 1994.

/s/ James L. Latchum
United States
District Judge

Title 39, United States Code

§ 101. Postal policy

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.

(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and

the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

* * *

§ 403. General duties

(a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair

and reasonable rates and fees. The Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.

(b) It shall be the responsibility of the Postal Service –

(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide;

(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

(3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

* * *

§ 407. International postal arrangements

(a) The Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries. The decisions of the Postal Service construing or interpreting the provisions of any treaty or convention which has been or may be negotiated and concluded shall, if approved by the President, be conclusive upon all officers of the Government of the United States.

(b) The Postal Service shall transmit a copy of each postal convention concluded with other governments to the Secretary of State, who shall furnish a copy of the same to the Public Printer for publication.

290 International Customized Mail

• Effective May 16, 1994, and until further notice, IMM subchapter 290, international Customized Mail (ICM), and the service provided under subchapter 290 is suspended. No new ICM areements [sic] are to be concluded and no service rendered under any ICM agreement already concluded. This action is being taken to implement an injunction issued by the United States District Court for the District of Delaware.

291 Description

International Customized Mail (ICM) service is an international business mail service that is available only pursuant to an ICM service agreement between the Postal Service and a mailer meeting the requirements in 292. The Postal Service provides ICM service, on a mailer-specific basis, pursuant to the terms and conditions stipulated in a particular ICM service agreement.

292 Qualifying Mailers

To qualify for ICM service, a mailer must be capable, on an annualized basis, of either (1) tendering at least 1 million pounds of international mail to the Postal Service, or (2) paying at least 2 million dollars in international postage to the Postal Service. The mailer must also be capable of tendering all of its ICM mail to the Postal Service from a single location.

293 ICM Service Agreements

Each ICM service agreement must set forth the following:

a. The term of the agreement, including any renewal options.

b. The type of mail to be tendered by the mailer.

c. The destination country or countries.

d. The services to be provided by the Postal Service, including any speed-of-delivery targets.

e. Minimum volume commitments for each service.

f. Postage and method of payment.

g. Weight and size limits.

h. Preparation requirements.

i. Makeup requirements.

j. Any other obligations of either party.

k. The location from which the mailer is required to tender its items to the Postal Service.

294 **Postal Bulletin Notifications**

Within 30 days of entering into an ICM service agreement, the Postal Service must publish the following information about the agreement in the *Postal Bulletin*:

a. The term of the agreement, including any renewal options.

b. The type of mail involved.

c. The destination country or countries.

d. A brief description of each of the services to be provided by the Postal Service.

e. Minimum volume commitments for each service.

f. A brief description of any worksharing to be performed by the mailer.

g. The agreed-upon rate for each service at the volume level committed to by the mailer.

Postal Bulletin No. 21826 (Oct. 15, 1992)

INTERNATIONAL CUSTOMIZED MAIL

On September 16, 1992, the Postal Service entered into an International Customized Mail service agreement with a qualifying mailer. In accordance with *International Mail Manual* (IMM) 290.4, the Postal Service hereby makes public the following information about that service agreement:

Term. September 16, 1992, through August 31, 1993.

Type of Mail. Postal parcels; all parcels comply with the size and weight limits specified in IMM 273.

Destination Countries. With some minor exceptions, all foreign countries to which the Postal Service provides mail service.

Services Provided by the Postal Service. The Postal Service has agreed (1) to furnish the mailer with the required, international mail equipment; (2) to train the mailer's mail-preparation personnel to comply with the requirements, for international postal parcels; (3) to verify the mailer's parcels at the mailer's plant; and (4) to contract with air and surface carriers, as appropriate, for the mailer's parcels to be transported to the destination countries for delivery by foreign postal administrations.

Minimum Volume Commitments. The mailer has agreed to use the Postal Service for all of its international postal parcel mailings while the service agreement is in effect, except that the mailer is not obligated to use the Postal Service for its postal parcel mailings to Canada, Mexico, Great Britain, Germany, Australia, and New Zealand sent on or before November 30, 1992.

Worksharing. The mailer has agreed (1) to sort and to sack its parcels to the individual destination country; (2) to sort and to sack its parcels to Canada according to specified Canadian Postal Code separations; (3) to mark its parcels sent at air rates with the endorsement Airmail Par Avion; (4) to palletize its parcels as instructed by the Postal Service; (5) to have its parcels to all countries except Japan appear on a computerized manifest generated under a Postal Service-approved Manifest Mailing System that includes, for each destination country, a summary of the number of parcels of each different weight and the total weight of parcels in that mailing; (6) to have its parcels to Japan appear on a manifest that specifies the total weight of parcels in that mailing being sent to Japan; (7) to tender its parcels to the Postal Service at designated Postal Service surface exchange offices, or at other designated Postal Service or air carrier facilities, as appropriate.

Parcels Sent on or Before November 30, 1992

Country or Rate Group[1]	Air Rate[2]	Local Tender Surface Rate[3]	Exchange Office Surface Rate[4]
1	$2.00/lb.	$1.79/lb	$1.59/lb.
2	$5.50/lb.	$2.26/lb	$2.06/lb.
3	$6.25/lb.	$2.70/lb	$2.50/lb.
4	$5.25/lb.	$2.21/lb	$2.01/lb.
5	$4.75/lb.	$2.49/lb	$2.29/lb.
Canada	NA[5]	NA	NA
Mexico	NA	NA	NA
Great Britain	NA	NA	NA
Germany	NA	NA	NA
Australia	NA	NA	NA
New Zealand	NA	NA	NA

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[1] See Destination Country Rate Group Table below.

[2] For parcels sent as air parcels and tendered to the Postal Service at its local airport mail facility or at the appropriate air carrier facilities.

[3] For parcels tendered to the Postal Service at its local bulk mail facility.

[4] For parcels tendered to the Postal Service at its surface exchange offices located at Jersey City, New Jersey and Oakland, California.

[5] This type of service is not available.

Parcels Sent on or After December 1, 1992

Country or Rate Group	Air Rate	Local Tender Surface Rate	Exchange Office Surface Rate
1	$2.00/lb..	Published[6]	$1.59/lb.
2	$5.50/lb..	Published	$2.06/lb.
3	$6.25/lb..	Published	$2.50/lb.
4	$5.25/lb..	Published	$2.01/lb.
5	$4.75/lb..	Published	$2.29/lb.
Canada	NA	Published	NA
Mexico.....	NA	Published	NA
Great Britain...	NA	Published	$2.00/lb.
Germany.....	NA	Published	$2.00/lb.
Australia.....	NA	Published	$2.00/lb.
New Zealand ..	NA	Published	$2.00/lb.

These rates are based on the mailer's tendering its parcels to the Postal Service at particular facilities according to an agreed-upon distribution scheme. The mailer has agreed that in the event that the total weight of parcels that it tenders at local tender surface rates on or before November 30, 1992, is more than 25 percent of the total weight of all parcels that it tenders on or before November 30, 1992, the mailer will pay the Postal Service liquidated damages in an amount equal to 20 cents per pound for each pound over the 25-percent maximum.

-International Business Dept., 10-15-92

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[6] This service is available at the surface parcel post rate in effect at the time the mailer tenders its parcels to the Postal Service, as shown in the IMM's Individual Country Listings.

Postal Bulletin, No. 21846 (July 22, 1993)

INTERNATIONAL MAIL

International Customized Mail

On June 22, 1993, the Postal Service entered into an International Customized Mail service agreement with a qualifying mailer. In accordance with International Mail Manual (IMM) 294, the Postal Service hereby makes public the following information about that service agreement:

a. Term: June 22, 1993, through July 16, 1993.

b. Type of Mail: Printed matter; no item may exceed 9 1/4 inches in length, 4 1/4 inches in width, or 1/4 inch in depth.

c. Destination Countries: Approximately 80 foreign countries scattered throughout the world, with the bulk of volume going to Canada, South America, and Western Europe.

d. Services Provided by the Postal Service: The Postal Service has agreed (1) to furnish the mailer with required international mail equipment; (2) to train the mailer's mail preparation personnel to comply with requirements for international mail; (3) to verify mail at the mailer's plant; and (4) to contract with air and surface carriers, as appropriate, for mail to be transported to the destination countries for delivery by foreign postal administrations.

e. Minimum Volume Commitments: The mailer has agreed to use the Postal Service for all of its international mailings of a certain category while the service agreement is in effect. The mailer is not required to meet any overall minimum or maximum volume commitments.

f. Worksharing: The mailer has agreed (1) to use its best efforts to notify the Postal Service at least 2 days before each mailing date of (i) the destination countries to which mail will be sent on that mailing date, and (ii) the number of items addressed to each of those destination countries; (2) to sort and to sack mail to the individual destination country; (3) to sort and to sack mail addressed to Canada according to specified Canadian Postal Code separations; (4) to accompany its mail with a manifest that lists, for each destination country, the number of sacks and the sacks' total weight; and (5) to containerize mail as instructed by the Postal Service.

g. Rates: $4.781 per pound. (This rate is based on the anticipated destination country distribution of mail.)

On July 1, 1993, the Postal Service entered into an International Customized Mail service agreement with a qualifying mailer. In accordance with IMM 294, the Postal Service hereby makes public the following information about that service agreement:

a. Term: July 1, 1993, through June 30, 1995.

b. Type of Mail: Printed matter; no item may weigh less than 4.8 ounces or more than 8.2 ounces.

c. Destination Countries: Japan.

d. Services Provided by the Postal Service: The Postal Service has agreed (1) to furnish the mailer with required international mail equipment; (2) to train the mailer's mail preparation personnel to comply with requirements for international mail; (3) to verify mail at the mailer's plant; (4) to contract with air and surface carriers, as

appropriate, for mail to be transported to Japan for delivery by the Japanese postal administration; (5) to use its best efforts to arrange for mail to be transported from the origin airport to Japan on direct flights, with no intermediate transfers; (6) to use its best efforts to dispatch mail to Japan within 24 hours of the mail's arrival at the Postal Service's international air mail facility; (7) to use its best efforts to provide the mailer with (i) the date and time that the air carrier takes possession of the mail from the Postal Service (within 48 hours); (ii) the dispatch number (within 48 hours); (iii) the air carrier used, the flight number, and the flight schedule (within 48 hours); and (iv) the date and time that the Japanese postal administration takes possession of the mail from the air carrier (within 72 hours); (8) to bill the mailer for postage on a net-15-days basis, consistent with the terms of the International Customer Billing Program; and (9) at the mailer's request, to use its best efforts (i) to ascertain the status of mail from the Japanese postal administration, and (ii) if delivery of such mail has been delayed, to resolve the Japanese postal administration's concerns regarding the mail.

e. Minimum Volume Commitments: The mailer has agreed to use the Postal Service for all of its international mailings of a certain category while the service agreement is in effect. The mailer is not required to meet any overall minimum or maximum volume commitments.

f. Worksharing: The mailer has agreed (1) to provide the Postal Service with a list setting forth the mailer's planned schedule of mailings, including, for each planned mailing, the mailing date, the number of items that will be in that mailing, the size and weight of items

that will be in that mailing, and which of two printers will be handling that mailing; (2) to update that list (i) on a regular basis, at a minimum frequency of once per month; (ii) immediately for any change affecting a planned mailing with a mailing date within 2 months of the date of such change; (iii) at least three days before each mailing to confirm all final specifics of that mailing; and (3) to palletize the mail as instructed by the Postal Service.

g. Rates: $3.08 per pound if the mailer elects to have undeliverable mail returned from Japan by surface mail; $3.05 per pound if the mailer elects not to have undeliverable mail returned from Japan.

-Marketing and Sales, 7-22-93

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

UPS WORLDWIDE FORWARDING, INC.,	:	CIVIL ACTION
Plaintiff	:	
v.	:	NO. 93-340 (JLL)
UNITED STATES POSTAL SERVICE,	:	
Defendant	:	

Wilmington, Delaware
Thursday, April 7, 1994
10:27 o'clock, a.m.

BEFORE: HONORABLE JAMES L. LATCHUM, Senior Judge

APPEARANCES:

CONNOLLY, BOVE, LODGE & HUTZ
BY: F. L. PETER STONE, ESQ.
-and-
SCHNADER, HARRISON, SEGAL & LEWIS
BY: JOHN E. McKEEVER, ESQ. and
K. T. TOMLINSON, ESQ.
(Philadelphia, Pennsylvania)

Counsel for Plaintiff

Valerie J. Gunning
Official Court Reporter

* * *

[p. 45] would be plausible and supported by the legislative history and also by Congress' acquiescence.

As a practical matter, I should mention that probably 97 percent of all international rates–maybe more than that–are established pursuant to the Universal Postal Convention, which is cited to you and explained in more detail in our briefs.

So we're talking about only a limited amount of times where the Postal Service actually gets to exercise its authority which, in fact, it has on numerous occasions, which we explain in our affidavit attached to our answering brief in Paragraph 5.

So, to sum up that provision, your Honor, this argument, while we believe the plain meaning of the statute supports our interpretation that we're not required to get international rates, certainly, the ambiguity created should give the Postal Service heightened efforts to their interpretation, which is long-standing and contemporaneous.

THE COURT: Thank you.

MS. SHARRIN: And if you have no further questions on that, I'll address the intervention briefly.

THE COURT: Go ahead, then.

MS. SHARRIN: In that case, ACC moved to intervene and we objected, making the exact standing argument that we made before. They said that the Constitution is

* * *

Supreme Court, U.S.
FILED
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Nos. 95-931 and 95-944

In the Supreme Court of the United States

OCTOBER TERM, 1995

UPS WORLDWIDE FORWARDING, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE

AIR COURIER CONFERENCE OF AMERICA/
INTERNATIONAL COMMITTEE, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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30 pp

QUESTIONS PRESENTED

1. Whether the United States Postal Service has authority to offer individually negotiated rates to large-volume users of international mail.

2. Whether the President consented to the Postal Service's establishment of the program for individually negotiated rates challenged in this case when he permitted the program to take effect without objection.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-931

UPS WORLDWIDE FORWARDING, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE

No. 95-944

AIR COURIER CONFERENCE OF AMERICA/
INTERNATIONAL COMMITTEE, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (UPS Pet. App. A1-A43)[1] is reported at 66 F.3d 621. The opinion of the

[1] In this brief, we refer to the petition in No. 95-931 as "UPS Pet." and the petition in No. 94-944 as "ACCA Pet."

district court (UPS Pet. App. A44-A59) is reported at 853 F. Supp. 800.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1995. The petitions for a writ of certiorari were filed on December 13, 1995 (No. 95-931) and December 14, 1995 (No. 95-944). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1970, when Congress created the United States Postal Service in the Postal Reorganization Act (PRA), it established two mechanisms for the setting of postal rates. Domestic postal rates are set by the Postal Service under a complex process that also involves the Postal Rate Commission. See 39 U.S.C. 3601-3628 (1988 & Supp. V 1993). Ratemaking for international mail does not involve the Postal Rate Commission. See *Air Courier Conference of America* v. *United States Postal Service*, 959 F.2d 1213 (3d Cir. 1992). The authority to establish international rates is vested in the Postal Service and the President under 39 U.S.C. 407(a), which provides that "[t]he Postal Service, with the consent of the President, may negotiate and conclude postal treaties or conventions, and may establish the rates of postage or other charges on mail matter conveyed between the United States and other countries."

The Postal Service's ratemaking authority is subject to a number of general constraints under the PRA. The Postal Service has a general duty to "provide types of mail service to meet the needs of different categories of mail and mail users." 39 U.S.C. 403(b)(2). The statute also requires that

postal rates "apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." 39 U.S.C. 101(d). In addition, in providing services and setting rates, the Postal Service must not "make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preference to any such user." 39 U.S.C. 403(c).

2. This case concerns International Customized Mail service (ICM), a program under which the Postal Service negotiates volume-based rates with large-scale users of international mail. The origin of ICM lies in the Postal Service's decision, in 1986, to suspend in part its statutory postal monopoly and to permit "international remailing," a practice by which private courier companies deposit letters destined for foreign addresses with foreign postal systems. See *Air Courier Conference of America* v. *American Postal Workers Union*, 498 U.S. 517, 519-520 (1991); 39 U.S.C. 601(b). Having permitted private companies to compete with it for delivery of international mail, the Postal Service then adopted the ICM program to make its own international mail delivery service competitively attractive to customers. That action responds to Congress's decision, when it created the Postal Service in 1970, that the Service should be "run more like a business than had [been] its predecessor, the Post Office Department." *Loeffler* v. *Frank*, 486 U.S. 549, 556 (1988).

In May, 1993, the Postal Service adopted a final rule implementing ICM. See 58 Fed. Reg. 29,778-29,782 (*reprinted at* ACCA Pet. App. 60a-83a). Under ICM, a qualifying mailer and the Postal Service can negotiate an individual agreement, which specifies the type of mail to be tendered, minimum volume

commitments, and the rate of postage. *Id.* at 81a-82a. To qualify for ICM, a mailer must be capable, on an annual basis, of tendering at least 1,000,000 pounds of international mail, or tendering mail costing at least $2 million in international postage; it must also be capable of tendering all of its ICM mail from a single location. *Id.* at 81a. Most of the information contained in each ICM agreement (including the negotiated rates) is published in the Postal Bulletin. See, *e.g.*, UPS Pet. App. A69-A76.[2] Once any particular ICM agreement is concluded, the Postal Service undertakes to make the same terms available to any similarly situated mailer. ACCA Pet. App. 78a.

In its commentary accompanying the final ICM rule, the Postal Service explained that it had "found it increasingly difficult to compete effectively against other providers" of international mail services, and that ICM was needed "to provide the Postal Service with the pricing flexibility necessary to attract new business customers and to keep existing business customers at rates that accurately reflect the Postal Service's costs of delivering the customer-specific mail volumes." ACCA Pet. App. 70a. It also noted that, because the ICM program will attract new customers that would otherwise use private couriers, ICM "makes all of the Postal Service's customers better off because the additional business generated not only covers the extra variable costs it causes, but

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[2] The only significant terms required to be contained in an ICM agreement that are not published in the Postal Bulletin are the weight and size limits on the mail covered by the agreement, and the location from which the mailer is required to tender the items to the Postal Service. ACCA Pet. App. 82a-83a.

also enables the Postal Service to recover its fixed costs from a larger base of customers." *Id.* at 71a. It therefore concluded that focusing "its marketing efforts on the large business customers that collectively make up the most competitive market" would be a sensible business practice. *Id.* at 73a.

3. Petitioner UPS Worldwide Forwarding, Inc. (UPS), a private international delivery service, brought this action against the Postal Service in district court to challenge the validity of ICM agreements. UPS contended that negotiated, individualized rates for particular mailers violate Sections 101(d), 403(b)(2), 403(c), and 407(a) of the PRA (39 U.S.C. 101(d), 403(b)(2), 403(c), and 407(a)). UPS also argued that Section 407(a) requires the approval of the President for the establishment of any rates for international mail, and that the required approval was not given for ICM. Petitioner Air Courier Conference of America/International Committee (ACCA), an association of firms engaged in letter and parcel delivery services, moved to intervene as a party plaintiff.

The district court granted UPS's motion for summary judgment. UPS Pet. App. A44-A59. The court first held that UPS had standing to sue, under both Article III and the prudential requirements for standing. UPS Pet. App. A48-A50.

The court then accepted virtually all of UPS's arguments on the merits. It ruled, first, that individualized ICM agreements violate Section 403(b)(2), which requires the Postal Service to establish "categories" of mail and mail users. UPS Pet. App. A51. It held next that ICM agreements violate the statutory prohibition against "undue or unreasonable discrimination" among mailers (39 U.S.C. 403(c)),

because the eligibility criteria for ICM service require only that a mail user be *capable* of tendering 1,000,000 pieces of mail a year, not that the mailer actually commit to tendering that large amount of mail. UPS Pet. App. A51-A52. Under the ICM criteria, the court remarked, one mailer could get a better rate than another, even if the two in fact ended up tendering the same amount of mail to the Postal Service over the course of a year. *Ibid.* That result, held the court, also violates Section 101(d), which requires the Postal Service to apportion the costs of its service on a fair and equitable basis. UPS Pet. App. A52-A53.

The court also agreed with UPS that Section 407(a) requires presidential approval for international ratemaking, and that such approval was not obtained for the ICM program. It rejected the Postal Service's argument that Section 407(a) required only that the President consent to international postal conventions negotiated by the Service, not that he approve international rates set by the Service. UPS Pet. App. A53-A55.[3]

4. The court of appeals reversed. UPS Pet. App. A1-A43. The court agreed with the district court that UPS satisfied the requirements for constitutional standing (*id.* at A8-A9) and prudential standing (*id.* at A10-A24). It noted that "the primary focus of the parties' dispute over standing" was whether UPS's interests as a competitor of the Postal Service fell within the "zone of interests" protected by the PRA.

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[3] The court granted ACCA's motion to intervene, and declined to address ACCA's standing, since it had already concluded that UPS had standing to initiate the suit. UPS Pet. App. A56-A58 & n.5.

Id. at A15. It concluded that UPS satisfied that requirement of prudential standing because the rate-setting provisions of the PRA upon which its claim rested were "inextricably linked" to the separate, "private express" provisions of the PRA governing the postal monopoly, and because both parts of the PRA were intended to "affect" competitors of the Postal Service. *Id.* at A21.

On the merits, the court of appeals rejected the district court's reading of the statutory provisions at issue. Contrasting the PRA's complex rate-setting mechanism for domestic mail with the international rate-making provision, which it described as "a model of simplicity," it concluded that Congress had intended to grant the Postal Service "significant authority and flexibility" in establishing international rates. UPS Pet. App. A25-A26. And, contrary to the district court, the court of appeals determined that the Postal Service had provided a "reasonable explanation" for its "business decision" to base the eligibility threshold for ICM service on a customer's capacity (rather than actual commitment) to supply a particular volume of business—namely, that to require a firm commitment would "drive [customers] off." *Id.* at A30. "We see nothing in the PRA," the court stated, "that prevents the Postal Service from innovative attempts to increase business and profits, as long as it stays within the bounds of the relevant statutes." *Id.* at A31.

The court concluded that ICM does not violate either the requirement of Section 101(d) that postal costs be apportioned on a "fair and equitable basis," or that of Section 403(c) that the Service not engage in "undue or unreasonable discrimination" or give "undue or unreasonable preferences." UPS Pet. App.

A31-A34. Noting that "[t]he determination whether a particular rate is 'fair' or 'equitable' is not capable of precise definition," the court upheld the Postal Service's decision to grant discounts based on capacity for, rather than commitment to, large-scale mailing, since that choice "reflects a reasonable business decision about the most effective means to solicit new customers." *Id.* at A31. As for the ban on "undue or unreasonable" practices, the court noted that the statutory language necessarily "means that reasonable discrimination and preferences among users of the mail are permitted." *Ibid.* "Allowing a limited class * * * to negotiate individual service plans at individual rates does not appear on its face to be 'undue or unreasonable,'" since it permits the Service "to compete more effectively for the business of large-volume mailers * * *, fulfilling congressional intent." *Id.* at A31-A32. The court observed that other courts "have accorded postal authorities broad latitude" when considering whether postal rate classifications violate the ban on undue preferences. *Id.* at A32-A34.

The court also concluded that ICM does not contravene Section 403, setting forth the "general duties" of the Postal Service and providing that the Service shall "provide types of mail service to meet the needs of different categories of mail and mail users." UPS Pet. App. A34-A36. It reasoned that the group of customers capable of delivering 1,000,000 pieces of mail annually is a "category" of mail users, and it rejected the contention that the general provision relied on by UPS by implication prohibited the negotiation of individual rates with large-scale users. *Id.* at A35. "There is nothing in this section," the court stated, "that bars the Postal Service from

doing more than the minimum required here"—providing service to "meet the needs of different categories of mail and mail users." *Id.* at A36.

The court further rejected UPS's contention that Section 407(a) requires affirmative manifestation of consent to international rates by the President.[4] Noting that the statutory language regarding presidential consent has been essentially unchanged since 1851, and that the consistent historical practice has been for international rates to become effective without express presidential consent, the court "decline[d] * * * to prescribe certain procedural steps the President must take" to manifest his consent. UPS Pet. App. A39. It therefore concluded that the President had, within the meaning of Section 407(a), consented to the Postal Service's implementation of ICM by not objecting to it.

Finally, the court considered the degree of deference to be accorded to the Service's interpretation of the PRA. It noted that, in a prior decision, it had found controlling the principles of *Chevron U.S.A.*

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[4] On appeal, the Postal Service did not challenge the district court's conclusion that Section 407(a) requires presidential consent to international postage rates as well as international postal conventions. Rather, it argued that, with respect to international rates, the President had consistently followed a practice of consenting by allowing them to take effect without objection. See UPS Pet. App. A37.

While the appeal was pending, the President issued a memorandum expressly delegating, to the Governors of the Postal Service, his authority to consent to international postal rates. That delegated authority is effective until the issuance of the court of appeals' mandate in this case. See App., *infra*, 1a-3a; 59 Fed. Reg. 65,471 (1994). Neither petitioner has argued here that the President's delegation is insufficient, under Section 407(a), to sustain the validity of ICM.

Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). UPS Pet. App. A42. It also stated that, because in this case the Service was construing a regulation explicitly designed to take away customers from competitors, a "reduced level of deference" might be appropriate. But because the court was "convinced the ICM service does not contravene the PRA," it did not resolve the issue, and did not rely on "any deference that might be due." *Id.* at A43.

ARGUMENT

1. Both petitioners contend that various Sections of the PRA prohibit the Postal Service from negotiating individualized service agreements. UPS Pet. 9-22; ACCA Pet. 21-22. Those contentions are incorrect.

a. Both petitioners rely on 39 U.S.C. 403(b)(2), which charges the Postal Service with the obligation to provide "types" of mail service to "categories" of mail users. See UPS Pet. 9-10; ACCA Pet. 22. That charge, however, does not forbid the Postal Service from meeting particularized needs of individual mail customers. As the court of appeals pointed out (UPS Pet. App. A35), Congress showed elsewhere that it knew how to restrict the Service's flexibility in setting postal rates. See, *e.g.*, 39 U.S.C. 3623(d) and 3683 (1988 & Supp. V 1993) (both requiring "uniform" rates for certain kinds of mail).[5]

As the court of appeals also observed (UPS Pet. App. A35), the group of customers that meets the

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[5] For the same reasons, ACCA's reliance on the Service's responsibility to establish "classifications" (39 U.S.C. 403(c)) and a "mail classification schedule" (39 U.S.C. 3623) does not support its "plain meaning" argument that the statute precludes individualized rates. See ACCA Pet. 22.

eligibility criteria for ICM service comprises a "category" of mail users, and negotiated individualized service agreements with those customers are a "type" of service. Because the terms of any negotiated ICM contract are available to all similarly situated mailers (ACCA Pet. App. 78a), the formation of an ICM contract creates a "category" of mail users to which the Postal Service will provide a particular "type" of service.

Petitioners' construction of Section 403(b)(2) is further undermined by the language of Section 403(c), which expressly forbids undue and unreasonable discrimination and preferences in the provision of postal services and the setting of postal rates. The court of appeals correctly recognized that this language means that distinctions among users are permissible if they are not unreasonable. See UPS Pet. App. A31, A35.

b. Both petitioners invoke Section 407(a), which grants the Service authority to "establish" international "rates" of postage. UPS contends that Congress's use of "establish" shows that it intended "something more lasting" than negotiation of prices and services on a mailer-specific basis. UPS Pet. 10-11. As the court of appeals pointed out, however, "establish" cannot mean the creation of permanent rates, since the Postal Service would then be barred from ever changing its rates, which Congress could not possibly have intended. UPS Pet. App. A37.[6]

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[6] UPS's reliance on *Air Courier Conference of America* v. *United States Postal Service*, where the Third Circuit earlier quoted a dictionary definition of "establish" as meaning "to set up . . . permanently," is misplaced. In that case, the court of appeals contrasted "establish" with terms such as "request,"

ACCA focuses on the statutory word "rate," arguing that its use compels the conclusion that Congress intended to bar individualized negotiation of prices and services. ACCA Pet. 21-22. The meaning of that broad term, however, is not confined to a price available to all or most customers. See *Webster's Third New International Dictionary* 1884 (1986) (def. 2(3b): "a charge, payment, or price fixed according to a ratio, scale, or standard"); see also *United Parcel Service, Inc.* v. *United States Postal Service*, 604 F.2d 1370, 1377 (3d Cir. 1979) (rejecting the argument that "rate" in another provision of the statute applies only to a service made available to all members of the public on the same terms), cert. denied, 446 U.S. 957 (1980).

c. Petitioner UPS contends that ICM service violates the prohibition in Section 403(c) against "undue or unreasonable" discrimination and preferences. See UPS Pet. 11-17. In making that argument, UPS relies exclusively on cases construing the prohibition on unreasonable discrimination and preferences in the Interstate Commerce Act (49 U.S.C. 10741(a)) and other statutes that incorporate that Act's language. UPS did not rely on that line of authority in the court of appeals, nor did it give that court the opportunity to consider its current contention that ICM service—particularly the lack of a volume commitment in the threshold eligibility requirements for such service—is contrary to the

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used elsewhere in the statute, to emphasize the breadth of the Service's powers under Section 407. See 959 F.2d at 1220-1221.

"[e]stablished [l]aw" of undue discrimination. UPS Pet. 11.[7]

In any event, recent cases establish that individualized negotiated rates are not *per se* violations of statutory prohibitions against undue discrimination, if the negotiated rates are made public, and if the same rates are available to similarly situated customers.[8] The ICM program meets those requirements. The Postal Service has made clear that it will make rates contractually negotiated with a particular mail user available to any similarly situated user. See ACCA Pet. App. 78a. Those rates, along with most other terms of each agreement, are published in the Postal Bulletin, which is available by subscription from the Government Printing Office and is well known to large-volume mailers and competing carriers. UPS complains that "only selected contract terms are published" (UPS Pet. 4), but the only terms that (under the final ICM rule) must be

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[7] In its court of appeals brief, UPS referred to Section 403(c)'s prohibition against undue discrimination and preferences only once in its argument section; it there contended broadly that the provision was inconsistent with any individually negotiated rate. See UPS C.A. Br. 33 (asserting that Section 403(c) "presuppose[s] that rates are established on the basis of groupings of mail or mail users rather than individually negotiated"). It cited none of the Interstate Commerce Act cases relied upon in its certiorari petition.

[8] See *Sea-Land Serv., Inc.* v. *ICC*, 738 F.2d 1311, 1316-1319 (D.C. Cir. 1984); *MCI Telecomm. Corp.* v. *FCC*, 917 F.2d 30, 37-38 (D.C. Cir. 1990). The Interstate Commerce Commission has also concluded that, in setting rates, a carrier may take into account the volume of shipments without violating the anti-discrimination provision of the Interstate Commerce Act. See *Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I.C.C. 711, 715-716 (1982).

included in ICM agreements but are also omitted from the publication requirement are weight and size limits on covered mail items, and the location from which the mailer is required to tender the items to the Postal Service. See UPS Pet. App. A66-A68. Those two terms may reveal important business information about the customer that, if subject to the publication requirement, might deter large-volume mailers from using ICM service, or might enable the Postal Service's competitors, like UPS, to lure customers away from the Service.[9]

UPS has also argued that the Service's ICM program violates Section 403(c) because ICM is conditioned on a mailer's capability of tendering a threshold weight or dollar volume of mail, not its commitment actually to tender such a volume. As the court of appeals noted, any price discrimination that might result from this feature of the ICM program is not unreasonable, because it is supported by the Service's "logical and reasonable" business judgments. UPS Pet. App. A30. Offering customized service to large-volume mailers without requiring a particular volume commitment is a way for the Postal Service to induce valuable potential customers to give it some of their business; if the service offered is satisfactory, those customers may ultimately give the Service a large part of their high-volume

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[9] The list of terms to be published in the Postal Bulletin does not expressly include "[p]reparation requirements" and "[m]akeup requirements." See UPS Pet. App. A67-A68. Those terms, however, are subsumed within the requirement for publication of "[a] brief description of any worksharing to be performed by the mailer." *Id.* at A68.

international business.[10] The PRA does not prevent the Postal Service from making decisions about how to compete with private courier companies based on sensible business considerations; to the contrary, when Congress "launched [the Postal Service] into the commercial world" in 1970, it anticipated that the Service would make its operating decisions, including its decisions about rates, on the basis of such considerations. See *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 520 (1984); see generally *National Ass'n of Greeting Card Publishers* v. *United States Postal Service*, 462 U.S. 810 (1983).

2. Petitioner ACCA argues that review is warranted to resolve purported conflicts over application of the principles of deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It first contends that there is a conflict among the circuits as to whether a court should "presume" that an agency has statutory authority to issue a regulation when considering the validity of that regulation under *Chevron*. See ACCA Pet. 14-16. Whether or not there is such a disagreement in the courts of appeals has no

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[10] The Postal Service stated in the *Federal Register* that its purpose in initiating ICM was "to attract customers that currently use its competitors and would not otherwise use the Postal Service for their international mailings." ACCA Pet. App. 71a. Large-capacity customers represent "the most promising market," *id.* at 72a, and "[r]equiring an ICM user to be capable of generating a substantial amount of international mail allows the Postal Service to focus its marketing efforts on the large business customers that collectively make up the most competitive market for international hard copy communications and parcel delivery services." *Id.* at 72a-73a.

relevance to this case, however, for the Postal Service plainly has statutory authority to establish international postage rates through individual agreements with customers.

Section 401 of the PRA lists, among the "general powers" of the Postal Service, the power "to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title." 39 U.S.C. 401(2). A broader grant of rule-making authority is difficult to imagine, and courts have recognized that the Postal Service has broad authority to carry out its duties.[11] Section 401(3) specifically authorizes the Postal Service to enter into and perform contracts,[12] and Section 401(10) expansively grants the Service "all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers." With specific reference to postage rates, Section 404(2) empowers the Service to "prescribe, in accordance with this title, the amount of postage and the manner in which it is to be paid," and Section 407(a) grants the Postal Service (with the President's consent) the power to "establish the rates of postage or other charges on mail matter conveyed between

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[11] See, *e.g.*, *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F.2d 4, 7 (2d Cir. 1973) ("Broad rule-making authority must be allowed a federal agency such as the postal service whose activities are national in scope and are geared to meet varied conditions and circumstances throughout the country.").

[12] ACCA's reading of Section 401(3) as limited to procurement contracts (see ACCA Pet. 16) is unsupported by the statutory language, which authorizes the Service "to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures."

the United States and other countries." Separately and together, those provisions give the Service ample authority to establish postage rates through individual contracts. ACCA evidently believes that Congress must expressly delineate every mechanism through which the Postal Service may exercise this broad grant of international rate-making authority, but there is simply no support in the statute, nor elsewhere, for such a cramped view of the Postal Service's authority.

3. ACCA asserts that there is a conflict among the circuits on whether legislative history may be considered at the first stage of the inquiry prescribed by *Chevron*. ACCA Pet. 17-22. Legislative history, however, played little role in the court of appeals' interpretation of the statute in this case. The court relied principally on the plain language of the PRA to conclude that the ICM program did not contravene the statute. See ACCA Pet. App. 28a-36a. The court gave little consideration to the legislative history of the PRA, except to observe that ICM is generally consistent with Congress's objectives in enacting the PRA (see *id.* at 41a-42a).

ACCA further urges the Court to consider whether *Chevron* deference to the Postal Service's interpretation of its governing statute is appropriate given what ACCA characterizes as the Postal Service's "monopoly" status. ACCA Pet. 25-30. This case does not present any such issue, however, for the court of appeals explicitly declined to accord deference to the Service's construction of the statute, and arrived at

its interpretation upon *de novo* consideration of this issue. See UPS Pet. App. A43.[13]

4. ACCA also asserts that review is warranted to resolve a conflict over the PRA's "primary purpose." ACCA Pet. 23. ACCA points to *National Association of Greeting Card Publishers* v. *United States Postal Service*, 607 F.2d 392, 403 (1979), cert. denied, 444 U.S. 1025 (1980), in which the D.C. Circuit remarked that the "dominant objective" of Congress in the PRA "was not so much the regulation of demand for postal services, as the prevention of discrimination among mail classes." 607 F.2d at 403. According to ACCA, that general statement conflicts with the Third Circuit's determination here that, in ACCA's words, "*the* primary purpose underlying the PRA" was to require the Postal Service to adopt modern business practices. ACCA Pet. 23 (emphasis added).

The asserted conflict does not warrant review by this Court. What the Third Circuit actually said was that "Congress repeatedly indicated that *a* primary purpose underlying the PRA was to require the Postal Service to discard its system of political patronage and bureaucratic decision-making in favor of modern business practices." ACCA Pet. App. 30a-31a (emphasis added). The requirement of modern business practices is entirely consistent with a

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[13] We argued in the court of appeals that the Postal Service's interpretation of the PRA is entitled to deference even though the Postal Service has a financial interest in that interpretation. See *Fort Wayne Community Schools* v. *Fort Wayne Educ. Ass'n*, 977 F.2d 358, 366 (7th Cir. 1992) (according deference to Postal Service's interpretation of the private express statutes, which determine the boundaries of the Service's monopoly on domestic letter carriage), cert. denied, 114 S. Ct. 90 (1993).

prohibition against unfair discrimination among business classes. Any difference in the two courts' general characterizations of the overall purpose of the PRA is too abstract, and too attenuated from the actual result in either case, to warrant this Court's review.

5. UPS urges that express, affirmative consent by the President is required by Section 407(a) for ratification of international rates set by the Postal Service. UPS Pet. 22-26. The court of appeals correctly rejected that argument.

The court of appeals noted that, under the unbroken historical practice, dating back to 1851 legislation, which permitted the Postmaster General, "by and with the consent of the President," to change international postal rates set by Congress, "the President [n]ever has affirmatively manifested, by word or deed, his consent to changes in international rates." UPS Pet. App. A37-A38. "The President and postal authorities have long interpreted § 407(a) as not requiring the affirmative consent of the President." *Id.* at A38. Given that "undisputed historical record" (*ibid.*), the court "decline[d] * * * to prescribe certain procedural steps the President must take" to manifest his consent to international postal rates established pursuant to Section 407(a). UPS Pet. App. A39.

UPS contends that the court's reading of Section 407(a) is undermined by the fact that the President, when exercising authority under other statutes containing language requiring presidential consent, has expressed his consent affirmatively. UPS observes that the President has always consented expressly to postal treaties and statutes negotiated by postal authorities pursuant to another clause of

Section 407(a). UPS Pet. 24-26. But the language of Section 407(a) contains no indication of the manner by which the President must manifest his consent to international postal rates. Nor does anything in the statute bar the President from deciding that some matters (such as the conclusion of international conventions) should not go forward without his express, affirmative consent, but that the agency may proceed with its announced course of action with respect to other ratemaking matters, unless he objects. The practice by Presidents of giving affirmative consent to international postal treaties and conventions negotiated with foreign states by the Postal Service is natural, since such negotiations come within the core of the President's constitutional authority over foreign affairs. Cf. U.S. Const. Art. II, § 2, Cl. 2.[14]

This Court should be reluctant to disturb a presidential practice, concerning the relation between entities within the Executive Branch, that has existed without controversy for more than a century. Section 407(a) vests authority in the President to supervise the actions of the Postal Service, and it is for the President to determine how that supervisory authority shall be exercised. See *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947) (upholding, under the First War Powers Act of 1941, ch. 593, 55 Stat. 838, 50 U.S.C. App. 601 (1946), the President's power to transfer the

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[14] Even though the President has expressly delegated to the Postal Service his authority to consent to the establishment of the ICM program until the issuance of the court of appeals' mandate, he has declined to delegate his authority to consent to international postal treaties and conventions. App., *infra*, 2a.

functions of one federal agency to another one that he had created, and giving "great weight" to the President's repeated and consistent construction of his authority under that Act).

6. We believe that the court of appeals erred in concluding that petitioner UPS has standing to challenge the ICM program. UPS Pet. App. A8-A24. We argued below that both petitioners lack "prudential standing" to challenge international rates set by the Postal Service, because competitors of the Service are not within the "zone of interests" sought to be protected by the relevant provisions of the PRA, which are designed to protect users of the mails.[15] Therefore, even if the petitions did raise issues of statutory interpretation warranting this Court's consideration, we believe the Court should not review those issues unless and until a case presenting them is brought by a proper party.

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[15] We noted below that the "zone of interests" test might not apply to this case, because the Postal Service is not subject to the judicial review provisions of the Administrative Procedure Act (APA), see 39 U.S.C. 410(a), and this Court has indicated that the "zone of interests" test is best understood as a gloss on the APA's requirement that a plaintiff be "aggrieved by agency action within the meaning of the relevant statute," 5 U.S.C. 702. See *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 400 n.16 (1987). If the "zone of interests" test is inapplicable, petitioners would be subject to a more stringent test for standing. *Clarke* so indicated by stating that the prudential standing test might be different in cases not involving the "generous review provisions" of the APA. *Ibid.* We stated below that we were content to have this case analyzed under the "zone of interests" test because, if (as we have contended) petitioners do not satisfy that test, *a fortiori* they do not satisfy a more stringent standing test applicable to a non-APA case like this one.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1996

APPENDIX

Presidential Documents

Memorandum of December 15, 1994

Delegation of Certain Authorities Under 39 U.S.C. 407(a)

Memorandum for the Governors of the United States Postal Service

I have been advised by the Department of Justice that the United States District Court for the District of Delaware held in *UPS Worldwide Forwarding v. United States Postal Service*, Civil Action No. 93-340, May 16, 1994, that the Postal Service must obtain the approval of the President to establish rates of postage or other charges on mail matter conveyed between the United States and other countries.

On appeal of the decision to the United States Court of Appeals for the Third Circuit, the Government argues that the explicit consent of the President is not required. In the view of the Government, to the extent that 39 U.S.C. 407(a) does require the President to consent, it does not require that consent be given in any particular manner. The Government's position is that the failure of the President to object to the establishment of international postage rates and other charges is consent to the establishment of such

rates and other charges. This has been the practice of the Government for the past 120 years.

To the extent that the District Court's decision creates or appears to create an obligation for the President to give his consent to the establishment of rates of postage and other charges on mail matter conveyed between the United States and other countries in a particular manner, by virtue of the authority vested in me by the Constitution and the laws of the United States of America, including section 301 of title 3 of the United States Code, I hereby delegate to the Governors of the United States Postal Service, as defined by section 202(a) of title 39 of the United States Code, any authority vested in me by section 407(a) of title 39 of the United States Code, with respect to the establishment of rates of postage and other charges on mail matter conveyed between the United States and other countries. This delegation is effective until the date on which the Third Circuit Court of Appeals issues its mandate in the aforementioned appeal. This delegation relates only to the establishment of rates of postage and other charges on mail matter conveyed between the United States and other countries; it does not affect the obligation of the Postal Service to seek the consent of the President to negotiate and conclude postal treaties or conventions.

This memorandum shall be published in the **Federal Register**.

/s/ WILLIAM J. CLINTON
William J. Clinton

THE WHITE HOUSE,
Washington, December 15, 1994.

Supreme Court, U.S.
FILED
FEB 15 1996
CLERK

No. 95-931

In The

Supreme Court of the United States

October Term, 1995

UPS WORLDWIDE FORWARDING, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF OF PETITIONER UPS WORLDWIDE FORWARDING, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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THE POSTAL SERVICE'S BRIEF DISTORTS BOTH THE REGULATION AT ISSUE AND PETITIONER'S ARGUMENTS.

1. The Postal Service states that "[t]his case concerns . . . a program under which the Postal Service negotiates volume-based rates." Postal Service Brief at 3. However, the Postal Service later concedes that the regulation in question does *not* involve "volume-based rates," in contrast to the agency decision upon which it relies, *Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I.C.C. 711 (1982). *See* Postal Service Brief at 13 n.8. The regulation does not require the negotiated rates to be based on volume actually tendered to the Postal Service, and a majority of the negotiated contracts do not have a minimum volume commitment. That is precisely why UPS contends – and why the district court found, UPS Petition at A51-A53 – that the regulation is unduly discriminatory under 39 U.S.C. §§ 101(d) and 403(c).

2. Although it does not argue waiver, the Postal Service suggests that Petitioner did not give the court of appeals "the opportunity to consider its current contention that . . . the lack of a volume commitment in the threshold eligibility requirements . . . is contrary to the '[e]stablished [l]aw' of undue discrimination." Postal Service Brief at 12-13. That is not so. UPS specifically addressed this issue on pages 33-34 of its brief to the court of appeals, and the court of appeals specifically decided the issue. *See* UPS Petition at A31-A34. Not only did the court of appeals have "the opportunity" to consider the issue, it actually did so.

3. The Postal Service suggests that it may negotiate special rate and service deals with favored mailers because the Federal Register notice adopting the regulation stated that the negotiated terms will be made available to any "similarly situated" mailer. Postal Service Brief at 4. The *regulation* states that the rates and services are provided "on a mailer-specific basis." UPS Petition at A66. The Postal Service does not cite even one instance where, during the twenty-two months the regulation was in effect, a "similarly situated" mailer was given a contract identical to one previously negotiated with another mailer. *See* 57 Fed. Reg. 30651, 30652 (1992) (interim regulation effective July 10, 1992).

More important, the actual contracts are not published. The Postal Service admits that "significant terms" which a mailer needs to know in order to determine if it is "similarly situated," such as the weight and size limits of the mail covered by the contract, "are not published in the Postal Bulletin" (a subscription publication which is not freely available to the general public). Postal Service Brief at 4 n.2. Furthermore, the "brief description" of contractual mailer "preparation" and "makeup" requirements, *see* Postal Service Brief at 14 n.9, that appears in the Postal Bulletin is so vague as to be completely uninformative. *See, e.g.*, UPS Petition at A69, A73. Thus, the situation here is vastly different from those in *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990), and *Sea-Land Services, Inc. v. ICC*, 738 F.2d 1311 (D.C. Cir. 1984), *see* Postal Service Brief at 13 n.8. There, the terms and conditions for obtaining the rates were embodied in publicly filed tariffs which were available for all the world to see. *See, e.g., MCI*, 917 F.2d at 38 ("What is

involved here is not the filing of contracts *qua* contracts but the filing of *tariffs based upon contracts* . . . [a]nd there is no procedural bar to a carrier's formulating a proposed tariff based upon negotiations with a potential customer"). As this Court stated in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990):

> If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published [and] known to all. . . . Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit . . . .

4. The Postal Service argues that the regulation complies with the statutory language providing for different "types" of mail service for "categories" of mail or mail users. It claims that the regulation's eligibility criteria define a "category" of mail users, and that the individual contracts with the negotiating mailers are a "type" of mail service. Postal Service Brief at 10-11. The Postal Service's definitions of "categories" and "types" shift from one sentence to the next. That is clear from the very next sentence in its brief, where it defines *each contract* as "a 'category' of mail users to which the Postal Service will provide a particular 'type' of service." Postal Service Brief at 11.

The fact remains that the negotiated contracts have rates that vary from one mailer to another. *See, e.g.*, UPS Petition at A69-A76. Under the Postal Service's approach, the terms "categories" and "types" are defined either so broadly or so narrowly, depending on the Postal Service's whim, that those terms lose all meaning.

5. The Postal Service reiterates the court of appeals' erroneous view that Congress wanted the Postal Service to be an aggressive competitor. Postal Service Brief at 3, 15. Congress intended the Postal Service to operate on a more business-like basis than when it was part of the President's Cabinet so that it could discharge its public service responsibilities more efficiently. At the same time, Congress showed concern for protecting "enterprises in the private sector of the economy" from Postal Service attempts to exploit its considerable advantages as a government run monopoly that need not pay taxes or comply with many of the laws that are applicable to its private enterprise competitors. *See* 39 U.S.C. § 3622(b)(4). Nowhere in the statute or in its legislative history is there any suggestion that Congress instructed the Postal Service to compete at all costs, or that Congress removed all restraints on the Postal Service's ability to compete. Even if there were such a suggestion, "[g]eneralized congressional exhortations to 'increase competition' cannot provide [a federal regulatory body] authority to alter the well-established statutory . . . requirements." *Maislin Industries*, 497 U.S. at 135.

THE POSTAL SERVICE'S ARGUMENTS ON THE PRESIDENTIAL CONSENT ISSUE ARE RED HERRINGS.

1. The Postal Service mischaracterizes Petitioner's position when it suggests that Petitioner asked the court of appeals "to prescribe certain procedural steps the President must take to manifest his consent to international

postal rates." Postal Service Brief at 19. There is no evidence that the President was ever even informed of the proposed agency action to which he supposedly consented. UPS therefore argued that the President must, at the very minimum, be informed of the action to which consent is required, and that the President must *actually* consent, in some manner or another. Consent may be manifested in any way the President wishes, as long as the statutory requirement of obtaining presidential consent is actually fulfilled.

2. The Postal Service resorts to the President's post-litigation Memorandum delegating to its Governors the duty to consent to international postal rates and states that Petitioner has not "argued here that the President's delegation is insufficient . . . to sustain the validity of" the regulation. Postal Service Brief at 9 n.4. But the regulation was issued *before* the President's delegation and therefore is not affected by that delegation. There is no evidence that the Governors acted after the presidential delegation to approve or re-issue the regulation.[1]

3. The Postal Service relies on an asserted "unbroken historical practice" pursuant to which "the President and postal authorities have long interpreted § 407(a) as not requiring the affirmative consent of the President." Postal Service Brief at 19, quoting the court of appeals'

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[1] Serious constitutional issues are raised by the delegation of a congressionally imposed requirement of presidential consent to the agency whose action must be consented to by the President. However, since the regulation in this case was not approved pursuant to the President's delegation, the propriety of that delegation is not at issue here.

decision, UPS Petition at A38. There is no such "undisputed historical record." UPS Petition at A24-A25. Until relatively recently, international postal rates were almost always established in postal conventions which the Postal Service concedes have always been "affirmatively" consented to by the President. The Postal Service also conceded before the district court that, even today, only 3% of all international rates would be affected by requiring the President to fulfill the congressionally-imposed duty to consent to international postal rates. *See* UPS Petition at A78.

The Postal Service's position boils down to the argument that a congressionally-imposed requirement may be read out of the statute by repeated flouting of the statutory command. But "[e]ven contemporaneous and longstanding agency interpretations must fail to the extent they conflict with statutory language." *Public Employees Retirement Sys. v. Betts*, 492 U.S. 138, 171 (1989); *accord Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 743 (1973).

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: February 15, 1996